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Circuit Court of the United States for the Northern District of New York.

October Term, 1852, *at Albany*.

Before Hon. SAMUEL NELSON, Associate Justice of the Supreme Court of the United States; Hon. NATHAN K. HALL, District Judge.

THE GLOBE.[1]

The extension of admiralty jurisdiction to the lakes, by the act of Feb. 26, 1845, (5 U. S. Stat. at Large, 726,) did not take away the concurrent remedy which existed at common law, and which is to be sought in the jurisprudence of the states, and usually in the state courts.

As a general, if not universal rule, in order to bind a defendant, or to confer any rights upon a plaintiff, by force of a judgment, in a *personal* action, the former must be served with notice of the institution of the suit, so that he may have an opportunity to appear and defend.

But a proceeding *in rem* forms an exception to the general rule, and binds the *res* in the absence of any personal notice to the party interested.

A *foreign* vessel was attached by a proceeding *in rem* under a law of Ohio in a court of that state, for repairs made and supplies furnished, and sold upon a judgment duly recovered in pursuance of such attachment. *Held*, that the judgment was conclusive upon the transfer and disposition of the vessel in whatever place she might be found, and upon the title to her, by whomsoever it might be questioned, and whether involved directly or collaterally.

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[1] We have been furnished with this very important case by Samuel Blatchford, Esq., Reporter of the Second Circuit, and hasten to lay it before our readers, as it overrules the decision of Judge Conkling, the District Judge, in the same case, upon two points of great interest in admiralty law. The opinion of Judge Conkling in the case was published by us in 13 Law Reporter (new series, vol. iii.), 488. We are also indebted to Mr. Blatchford for the report of the case of *The United States* v. *Enoch Reed*, which appears in this number.

Held also, that this was especially so, where the owner of the vessel at the time appeared in the suit in the Ohio court, and contested the proceedings throughout.

The case of *The Barque Chusan*, (2 Story, 455,) commented on and explained.

The rule in respect to maritime liens against vessels for supplies and materials furnished to her master at a foreign port, is, that the party first instituting legal proceedings for the purpose of enforcing his claim against the vessel, is entitled to satisfaction out of the proceeds of her sale.

The true meaning of a maritime lien is, that it renders the property liable to the claim without a previous judgment or decree of the court sequestering or condemning it, or establishing the demand, as at common law, and the action *in rem* carries it into effect.

The appropriation of the property to that end becomes absolute and exclusive on suit brought, unless superseded by some pledge or lien of paramount order.

The first action by which the property is seized is entitled to hold it as against all other claims of no higher character.

The *lien*, so termed, is, in reality, only a privilege to arrest the vessel for the demand, which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment of the same.

G. filed a libel *in rem* in the admiralty in New York, under the act of February 26, 1845, (5 U. S. Stat. at Large, 726,) against a vessel, to recover for supplies and materials furnished to her in New York, as a foreign vessel, owned in Michigan. Before the filing of the libel, she had been sold in Ohio upon a judgment recovered in a state court in Ohio, for supplies and materials furnished to her by C. subsequently to the time when G. furnished his supplies and materials. The Ohio judgment was recovered in a proceeding *in rem* against the vessel by attachment under a law of Ohio, she being then also a foreign vessel, owned in Michigan. *Held*, that thepriority of time in the furnishing of the supplies and materialsby G., gave him no paramount lien on the vessel over the lien of C.

WILLIAM H. GLENNY filed a libel *in rem* in the District Court against the steamboat Globe, to recover the sum of $445.49, for supplies and materials furnished to said steamboat at the request of her master, at the port of Buffalo Creek, in the Northern district of New York, between the 13th day of June, 1848, and the 10th day of September, 1849. The libel was filed on the 11th of May, 1850, under the act of Congress of February 26th, 1845, (5 U. S. Stat. at Large, 726,) extending the admiralty jurisdiction in certain cases to the lakes, and navigable waters connecting the same. The Globe was a foreign vessel, owned and registered at Detroit, in the state of Michigan, from before the 13th of June, 1848, until after the 31st of December, 1849.

The claimant, in his answer, set up a title to the steamboat, derived under a sale of it by execution upon certain judgments recovered in February, 1850, in the Superior Court of Cleveland, in the state of Ohio, which sale took place on the 9th of March, 1850. It was claimed that this

sale extinguished any lien which the libellant might otherwise have had upon the vessel.

The Ohio judgments were recovered by virtue of a statute of that state, passed February 26th, 1840, entitled, "An act providing for the collection of claims against steamboats and other water crafts, and authorizing proceedings against the same by name," and of an act explanatory thereof, passed February 24th, 1848. These acts provided, that steamboats and other water craft navigating the waters within or bordering upon the state, should be liable for debts contracted on account thereof by the master, owner, steward, consignee, or other agent, for materials, supplies or labor in the building, repairing, furnishing or equipping the same; that any person having such demand might proceed against the owner or owners, or master of such craft, or against the craft itself; that when suit should be commenced against the craft, the plaintiff should file his *precipe* to that effect, naming the craft or giving a substantial description of her, and with it a bill of the particulars of his demand, verified by affidavit; and, thereupon, the clerk should issue a warrant, returnable as other writs, directing the seizure of the craft and the detention of the same until discharged by due course of law; that the master, owner, steward, consignee, or other agent of the craft, might discharge her on giving security that she should be forthcoming to answer the judgment under the seizure; that on the return of the writ proceedings should be had as in other cases of process served and returned; that after judgment the vessel might be sold upon execution to satisfy the judgment, and the overplus, if any, should be paid over to the owner, master or agent, as in other cases of execution; and that an appeal, as in other cases, might be taken from any judgment rendered against the vessel.

The Globe was seized and sold in Ohio in the due course of proceedings against her, under these statutes, for debts contracted on her account for repairs made and materials, supplies, &c. furnished to her between the 20th of September, 1849, and the 31st of December, 1849. She was purchased at the sale by one Elisha T. Sterling, the highest bidder, for the sum of $14,000, on the 9th of March, 1850, and on the 26th of April, 1850, the claimant purchased her from Sterling for the sum of $17,000.

The above facts, with such others as are stated in the opinion of this court, are all that are necessary to an under-

standing of the case, in the view taken of it by the court.

The District Court pronounced for the libellant, and the defendant appealed to this court. The opinion of CONKLING, District Judge in the court below, will be found at length length in 13 Law Reporter, (new series, vol. 3,) 488.

Isaiah T. Williams, for the libellant.

William H. Greene and *Solomon G. Haven*, for the claimant.

NELSON, J. The extension of admiralty jurisdiction to the lakes by the act of Congress of February 26th, 1845, (5 U. S. Stat. at Large, 726,) did not take away the concurrent remedy that existed at common law. Indeed, that act saves, in express terms, this concurrent remedy, where it is competent to give it, and also any concurrent remedy which may be given by the state laws. It was also saved by the general act of 1789, conferring exclusive admiralty jurisdiction upon the District Courts of the United States. (1 U. S. Stat. at Large, 76, 77, § 9); *New Jersey Steam Navigation Company* v. *Merchants' Bank*, (6 How. 389, 390.)

The remedy at common law is to be sought in the jurisprudence of the states, and usually in the courts of the states. It may be administered in the Federal courts in cases where the citizenship or residence of the parties enables those courts to entertain the jurisdiction. (Act of September 24th, 1789, 1 U. S. Stat. at Large, 78, 79, § 11.) The modes of proceeding in pursuing this remedy are different in the different states, as it repects both the commencement of the suit and the steps taken in conducting it. Undoubtedly, as a general, if not universal, rule, in order to bind the defendant, or to confer any rights upon the plaintiff, by force of the judgment, in all personal actions, the former must be served with notice of the institution of the suit, so that he may have an opportunity to appear and defend. But a proceeding *in rem* forms an exception to the general rule, and binds the *res* in the absence of any personal notice to the party interested. (Story's Conflict of Laws, ch. 14, § 549, and cases cited, and ch. 15, §§ 592, 593); *Boswell's Lessee* v. *Otis*, (9 How. 336.)

There can be no doubt, therefore, that the judgments in this case, acting *in rem*, must be held conclusive upon the transfer and disposition of the vessel in question, in whatever place she may be found, and upon the title to her, by

whomsoever it may be questioned, and whether involved directly or collaterally.

The case of *The Barque Chusan*, (2 Story, 455,) which was referred to upon the argument, contains nothing in conflict with these views. That was the case of a libel in Massachusetts for materials furnished in the port of New York to a foreign vessel; and one of the grounds of defence was, that the statute of New York respecting the lien of a material-man, provided that the lien should cease when the vessel left the state. This ground of defence was overruled by Mr. Justice Story, for the reason that in a case of a foreign vessel the lien attached by force of the maritime law, which entitled the party to come into a court of admiralty to enforce it, and that the jurisdiction of the admiralty, thus acquired, could not be taken away or controlled by the state law. This is very clear. As it respects foreign vessels, the jurisdiction of the admiralty is not dependent upon the state law, but upon the law of the seas. No matter what may be the regulations of the state on the subject, as regards the jurisdiction of her own courts, they cannot affect that of the admiralty; and any state law which should attempt to control the admiralty jurisdiction would be unconstitutional and void.

The question, what would be the effect of any concurrent remedy given by the state law, when it should be enforced against the vessel by a court of the state, was not involved in the case of *The Barque Chusan*, nor was it examined by Judge Story. The only remark made by him in that case, from which an inference could be drawn in conflict with the views I have expressed in this case, is, that the statute of New York would be unconstitutional if applied to foreign vessels. But that remark was made in answer to the argument that the statute controlled the jurisdiction of the admiralty; and, in that view, the statute would have been unconstitutional.

It may be remarked, however, that it is unnecessary to place the decision of this branch of the case upon the ground that the Ohio judgments, acting *in rem*, would be conclusive in the absence of any personal notice to the party interested, because Robinson, the owner of the vessel at the time appeared in the suits in the court in Ohio, and contested the proceedings throughout.

These views disposed of the case, so far as the claims of the libellant upon the vessel are concerned, unless the fact

that his supplies and materials were furnished to her prior to the time when the repairs were made and the materials furnished to her by the Ohio creditors, gives him a lien which, in judgment of law, overreaches the proceedings and judgments in the Ohio court, and which he is entitled to enforce in the admiralty.

It has been argued, that this maritime lien against a vessel for supplies and materials furnished to her master at a foreign port is an abiding lien, and adheres to the vessel, and may be enforced over all claims of a like nature subsequently accruing in the course of her employment. I cannot assent to this position. On the contrary, I am satisfied that the true rule upon the subject is, that in respect to maritime liens of this description, the party first instituting legal proceedings for the purpose of enforcing his claim against the vessel, is entitled to satisfaction out of the proceeds of her sale. Upon any other view, the vessel would afford no reasonable security to the merchant in making advances or furnishing the necessary supplies; as, for aught he could know, the existing claims against her might exceed her value. It is apparent that, to give to this maritime lien the efficacy claimed, would greatly embarrass and obstruct the commerce and navigation of the country. It would deprive the master, in distant ports, of the means of meeting the exigencies of the service, because the vessel would furnish no adequate security for the necessary supplies or repairs.

This question has been the subject of examination by the learned District Judge for the southern district of New York. In a case which came before him in 1841, he held that the true meaning of a maritime lien was, that it rendered the property liable to the claim without a previous judgment or decree of the court sequestering or condemning it, or establishing the demand, as at common law, and that the action *in rem* carried it into effect; that the appropriation of the property to that end became absolute and exclusive on suit brought, unless superseded by some pledge or lien of paramount order; that it resulted from the nature of the right and the proceedings to enforce it, that the first action by which the property was seized was entitled to hold it as against all other claims of no higher character; that the lien, so termed, was, in reality, only a privilege, to arrest the vessel for the demand, which, of itself, constituted no

incumbrance on the vessel, and became such only by virtue of an actual attachment of the same.[1]

I concur fully in this view, and, therefore, hold, in this case, that the priority of time in the furnishing of the supplies and materials by the libellant gave him no paramount lien on the vessel over the liens of the creditors in the Ohio suits.

The error of the learned judge below consisted, I think, in holding: 1. That the proceedings and judgments in the Ohio courts were void on account of the absence of notice to the party interested; and, 2. That the lien of the libellant for the supplies and materials furnished by him to the vessel was paramount and overreached the judgments and sale under the laws of Ohio.

The decree of the District Court must, therefore, be reversed, and a decree be entered dismissing the libel with costs.

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[1] The case referred to is that of *The Triumph*, in the District Court for the southern district of New York, July 27th, 1841. The vessel having been sold under a decree and the proceeds paid into court, a question arose as to the proper distribution of the proceeds, they being insufficient to satisfy all the demands preferred against them. Various libels had been filed against the vessel, and thirteen attachments had been issued and served upon her or her proceeds, and petitions were also brought in by other parties setting up claims to the fund in court. Suits were brought by different seamen on the same voyage, by seamen on different voyages, by the assignees of wages of seamen, and by material-men for labor, supplies, materials, &c. The actions by the material-men were not brought in the order of time in which their debts accrued.

After passing upon the rights of the respective suitors to a remedy in the court, and in the form of procedure adopted by them, BETTS, District Judge, proceeded as follows:

"The remaining inquiry relates to the order in which the different demands are to be satisfied when of like rank. Are they to be paid *pro rata*, or does the prosecuting creditor who first obtains service of process upon the property, acquire a right to the first satisfaction? And, if any of the demands stand in a common rank, are the costs attending their prosecution entitled to preference in payment?

"An action *in rem* stands on a distinct footing from a suit at common law, or in chancery. The thing arrested is in sequestration to satisfy the specific demand thus fastened upon it. Whether the *res*, in kind, remains in court in the custody of the law to the termination of the suit, or is delivered up on stipulation, itself or its substitute remains subject to the particular claim, and is detained on that alone. The moment the attaching demand is satisfied, the thing attached is surrendered by the court, and nothing short of another attaching process will justify its longer detention. If other suits are instituted after the property is delivered on bail, (that bail, according to our practice, responding only to the particular suit,) most manifestly the after-demands could not be attached to the fund so raised. And if the property is not yet delivered out of court, subsequent arrests of

it while there in custody, would no more enure to place the subsequent actions on an equality with the one holding it under seizure, than they would when it stood released on bond or stipulation.

"The meaning and efficacy of a maritime lien is, that it renders the property liable to the claim without a previous judgment or decree of the court, sequestering or condemning it, or establishing the demand, as at common law, and the action *in rem* carries it into effect. *Ingraham* v. *Phillips*, (1 Day, 117); *Barber* v. *Minturn*, (Ib. 136.) Thus the appropriation of the *res* to that end becomes absolute and exclusive on suit brought, unless superseded by some pledge or lien of paramount order; and, it accordingly results from the nature of the right and the proceedings to enforce it, that the first action which seizes the property is entitled to hold it, as against all other claims of no higher character. (Clerke's Praxis, tit. 44, Hall's Adm. Pr. 89); *The People* v. *Judges of New York*, (1 Wend. 39.)

"The lien, so termed, is, in reality, only a privilege to arrest the vessel for the debt, which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment. (Hall's Adm. Pr. tit. 44; Abbott on Shipping, part 2, ch. 3, 142; 3 Kent's Comm. 169, 170); *The People* v. *Judges of New York*, (1 Wend. 39.)

"Applying these principles to the case before the court, the prosecuting creditors, (except seamen suing for wages,) are to be satisfied in the order in which the warrants of arrest were served upon the property, whether the vessel in kind, or her proceeds in court. Each action, with its appropriate costs, comes upon the fund according to the period of its commencement."

The United States *v.* Enoch Reed.

The Judiciary Act of 1789, (1 U. S. Stat. at Large, 88, § 29,) the Act of May 13th, 1800, (2 Ib. 82,) and the Act of July 20th, 1840, (5 Ib. 394,) adopt the state regulations respecting the procurement of grand and petit jurors to serve in the Federal Courts, and apply to those courts the state regulations respecting the qualifications and the exemptions of grand and petit jurors.

A challenge to a grand juror for favor, on the ground that he is the prosecutor or complainant upon a charge, or that he is a witness on the part of the prosecution, and has been subpœnaed or been bound in a recognisance as such, goes to the qualifications of the juror.

A challenge to the array of the grand jury in a given case, on the ground that they have been selected, summoned and returned by a person unfit to summon an indifferent jury in the case, touches the qualifications of the panel.

Therefore, state regulations repecting such challenges are applicable in the Federal Courts.

But peremptory challenges in criminal cases in the Federal Courts are regulated by the common law.

The absence of a *venire* for the summoning of the grand jury, in a case where it is required, is a ground of challenge to the array.

Challenges to the array of grand jurors are abolished by the laws of New York, and are consequently also abolished in the Federal Courts in New York.

But still, where there has been any improper conduct on the part of the officers employed in designating, summoning and returning the grand jury, an accused person who is prejudiced thereby has his remedy by motion to the court for relief.

All objections, however, to the proceedings in the selection and summoning of grand jurors over and beyond the right of challenge, are presented to the court for the exercise of its sound discretion, and, although there may be technical irregularities, it will not interpose unless satisfied that the accused party is prejudiced by them.

Under the Act of August 8th, 1846, (9 U. S. Stat. at Large, 73, § 3,) providing that no grand jury shall be summoned in the Federal Courts except upon an order for a *venire* to be made by a judge, a *venire* should be issued by the clerk of the court in pursuance of the order.

A verbal order given by a judge to the clerk in such case is sufficient, though no order be filed or entered of record.

The omission to issue a *venire* in such case, if a ground of challenge to the array, and if taken advantage of at the proper time, is fatal to the panel.

But if not a ground of challenge, or if the time for making the challenge be passt, it is only a ground for a motion to set aside the panel for cause.

The mere omission, however, to issue the *venire* is not such cause, where the application is addressed to the sound discretion of the court.

By the law of New York (2 R. S. 724, § 27, 28, persons "held to answer," that is, arrested and held to bail to appear at the term of the court a which the grand jury attends, to answer such complaints as may be presented against them, are the only persons who can challenge either the array of grand jurors, or the individual grand jurors for favor.

Where a party appeals to the sound discretion of the court to set aside an indictment for irregularities in drawing or summoning the grand jury, he must implicate the good faith of the officers concerned in discharging those duties.

Those officers, in New York, are bound to use the state boxes and the state ballots in drawing grand jurors, as the same are furnished to them by the state officers, and have no right to change or alter either.

It is the uniform practice in the Federal and State Courts for the clerk and assistant of the district attorney to attend the grand jury and assist in investigating the accusations presented before them. That practice must be regarded as settled; but any abuse or improper conduct on the part of any person admitted to the grand jury will be investigated by the court.

The court has no power to inquire into the mode in which the examination of witnesses was conducted before the grand jury, for the purpose of invalidating an indictment.

It will inquire, however, into the manner of swearing the witnesses, when they are sworn in open court, and into the competency of the evidence, whether oral or documentary, and into the manner of authenticating the latter species of evidence.

Where witnesses before a grand jury are testifying in regard to facts about which they have previously made *ex parte* affidavits, it is not improper for them to consult those affidavits to refresh their recollections; nor is there any objection to their swearing that certain facts, of which they have previously made statements on paper, are true.

Evidence before a grand jury must be competent legal evidence, such as is legitimate and proper before a petit jury.

On a criminal charge against several persons, for a participation in the rescue of a person from the hands of a public officer who held him in custody, the witnesses who were to testify before the grand jury were sworn in open court in the following manner: The clerk of the court was urnished with a general description of the persons accused — *The United States* v. *M. S. and others* — and then administered to the witnesses this oath: "You, and each of you, do severally solemnly swear, that the evidence you shall give to the grand inquest touching charges against M. S. and others, concerning which you shall be interrogated, shall be the truth, the whole truth, and nothing but the truth. So help you God." Upon the testimony given under this oath, twenty-four bills of indictment were found

against twenty-four different persons, one against each. No indictment was found against "M. S. and others," nor was any indictment found against any two persons jointly. On a motion by E. R., the defendant in one of the indictments, to quash it, on the ground that the oath was void as to him, *held*, that the oath was free from objection.

A general oath to give evidence touching criminal charges to be laid before the grand jury, without reference to any particular person, is unobjectionable.

If the oath embraces one or more persons by name, whose cases are about to be laid before the grand jury, and in respect to which the oath is administered, and nothing more, evidence cannot be given under it in support of any accusation against others.

The court has no power to revise the judgment of a grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint.

When, under § 6 of the Act of September 18th, 1850, (9 U. S. Stat. at Large, 463,) known as the Fugitive Slave Act, a warrant is issued by competent authority, that is sufficient to justify the arrest and detention of the fugitive until he is discharged by due course of law, and any person concerned in rescuing or attempting to rescue such fugitive out of the custody of the law, subjects himself to the penalties of the act.

THIS was a motion to quash an indictment found in the District Court at Buffalo, in November 1851, and transmitted to this Court. The indictment was founded upon section 7 of the Act of Congress of the 18th of September, 1850, (9 U. S. Stat. at Large, 464,) commonly called the Fugitive Slave Act, and the alleged offence consisted in rescuing from the custody of the United States marshal at Syracuse, Jerry, a person lawfully in his custody under that act, as a fugitive from service or labor. The indictment contained two classes of counts — one averring that the person rescued was held to service or labor in the State of Missouri, and was a fugitive from such service, and, as such, in the lawful custody of the marshal when the rescue took place — and the other averring that the person rescued was an alleged fugitive from service or labor, and was, at the time of the rescue, in the custody of the marshal, under a warrant duly issued by a United States commissioner under said act, he having jurisdiction of the case, and proceedings being in progress before him under said warrant, to determine whether the person rescued was such fugitive or not.

The motion was founded upon affidavits, and affidavits were read in opposition. The defendant had not pleaded, but was now brought into court for the first time, and arraigned, nor had he been arrested, or held to answer in any way, before the indictment was found.

David D. Hillis, for the defendant, stated two general

grounds for the motion: 1. Irregularities in obtaining the grand jury by which the indictment was found. 2. Irregularities in the proceedings by and before the grand jury after they were impanelled. Under the first point he was proceeding to urge: First, that there were irregularities on the part of the deputy marshal at Buffalo in drawing the grand jury: Second, that one of the grand jurors was a volunteer, not having been summoned by the deputy marshal: Third, that no order was made by the District Judge for a *venire* to summon the grand jury, as required by section 3 of the act of Congress of August 8th, 1846, (9 U. S. Stat. at Large, 73.): Fourth, that no *venire* or precept was issued by the clerk of the court to the marshal, authorizing him to summon the grand jury.

Nelson, J. A preliminary question suggests itself in this case, whether the provisions of the Revised Statutes of New York, (2 R. S. 724, §§ 27, 28,) prescribing the objections that may be taken to the organization of grand juries, are not binding on this Court, and whether, under those provisions, we are not precluded from looking into the objections which are raised. The act of Congress of July 20th, 1840, (5 U. S. Stat. at Large, 394,) is the act now in force regulating the drawing and impanelling of grand and petit juries in the Federal courts. That act adopts the state regulations, not only those existing when the act was passed, but any changes that might be thereafter made by the state in the mode of selecting and impanelling juries. That act also authorizes the Federal courts to adopt the state regulations by rule, so far as it may be practicable to do so. And a rule (46) has been made by the District Court for this district under that act, adopting the regulations of the Revised Statutes, as respects the organization of grand and petit juries. The state law regulates the length of notice required for drawing grand jurors, the notice necessary in summoning them, their qualifications, and the numbers necessary to constitute a quorum for business, and to find a bill. For regulations as to these matters in the Federal courts, we must look into the Revised Statutes. There, also, we find that the legislature has limited the objections that may be taken to grand jurors, either to the array, or to any particular member. We desire the counsel to turn his attention to the point suggested, because if we take the Revised Statutes as a guide in determining what objections may be looked into, the necessity of exam-

ining those now raised may be superseded. It is, therefore, proper to inquire whether we can go behind the indictment, and entertain objections to the organization of the grand jury beyond those which are prescribed by the state regulations.

Hillis read the sections of the Revised Statutes referred to, (2 R. S. 724, §§ 27, 28.)

"§ 27. A person held to answer to any criminal charge may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpœnaed or been bound in a recognisance as such; and if such objection be established the person so summoned shall be set aside.

"§ 28. No challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified in the last section."

By the law of New York, certain preliminary notices are necessary in getting together a grand jury. Can these notices be entirely dispensed with, and a mere voluntary body come together as a grand jury, and yet no objection be afterwards made by a party indicted by such body? Suppose the case of a grand jury not drawn at all, but admitted to have been packed, can a man indicted by it be cut off by the provisions of the Revised Statutes from raising the objection?

In the present case, a man served on the grand jury who was not summoned, and there was no order made by the district judge for a *venire*, and no *venire* issued to the marshal to summon the jury. The defendant had no notice of these irregularities before he was indicted. He was not bound over before indictment, and he now appears in court for the first time, and is arraigned. Is it a sufficient answer to his objections, to say that he might have objected to any individual grand juror on the ground that he was a witness or prosecutor, and that, not having been present to challenge for those prescribed causes, he cannot now object for any others? If we are bound by the statute, a jury might be packed, because that is no ground of challenge under the statute; or half of the jury might be volunteers, instead of the jury being summoned, as Ch. J. Marshall, in Burr's case, said the jury must be; or less than the legal number

of jurors might be impanelled. [NELSON, J. How far the Revised Statutes go upon the point of precluding objections other than those specified in the statute itself, is a question we desire to hear discussed. Are we tied down to the irregularities specified, or can we go into others?] A grand jury may have been drawn by a constable, or it may be confessedly corrupt. Are all these objections cut off by the statute of New York?

No case can be found in which a court has refused to look into the conduct of its own officers in drawing, summoning and impanelling a grand jury. *The People* v. *Hulbut*, (4 Denio, 133, 136); 6 Carr. & P. 90; *The People* v. *Jewett*, (3 Wend. 314, and 6 Wend. 386); *United States* v. *Coolidge*, (2 Gallison, 364); *The People* v. *McKay*, (18 Johns. 212.) The cases cited are authorities to show that a court will thus inquire when irregularities are brought to its notice.

The language of the Revised Statutes does not confine the party to the objections specified. It would be absurd for it to do so, where gross irregularities are perpetrated, and when, as here, a citizen applies for redress at the first opportunity.

It was decided by Ch. J. Marshall in *The United States* v. *Hill*, (1 Brock. 156,) in 1809, that neither the 29th section of the Judiciary Act of 1789, (1 U. S. Stat. at Large, 88,) nor the Act of May 13th, 1800, (2 U. S. Stat. at Large, 82,) applied to grand juries in the Federal courts. These acts prescribed the mode of procuring juries in all cases. They were amended by the act of July 20th, 1840, referred to, which speaks of "jurors to serve," &c. The language in all three of the acts is equally general, and, as the first two were held not to apply to grand juries, the last does not.

James W. Nye, on the same side. The objections raised here ought not to be confounded with challenges or a right to challenge. Such right existed at common law. The statute has only pointed out what shall be causes of challenge in particular cases. The 27th and 28th sections referred to, limit the right of challenge to a person who is "*held* to answer," to one recognised to appear at a given time and place, to answer any charge that may be preferred against him by a grand jury then and there to sit. If, in this case, the defendant had appeared at Buffalo, and objected to any grand juror for any cause specified in the

statute, he would have been told that he had no right to be heard because he was not *held* to answer there.

But the want of a *venire* was not ever the ground for a challenge. [NELSON, J. It was a ground of challenge to the array.] Then, no one could take advantage of it, unless "*held* to answer." And the statute leaves it still the duty of the court, as it ever was, to see that all the steps taken in impanelling the grand jury were regular.

Our objection lies back of the grounds of challenge specified in the Revised Statutes. The proceedings of the grand jury were void for the want of a *venire*. The body which found the indictment was no grand jury, but a tribunal unknown to our laws.

James R. Lawrence, (District Attorney,) and *Joshua A. Spencer*, for the United States. The objections to the proceedings in impanelling the grand jury are merely a challenge to the array. If the statute of New York regulates the challenge to the array in the Federal courts, then all the objections fall to the ground. Because, if the challenge could not now be made directly, it cannot be made in an indirect way by a motion to quash.

Congress had power to say that these proceedings should be regulated by the state law, and the state had power to make the regulations it has made. The object of the law as to challenges was, that the proceedings should not be always open for a party to object to every little irregularity. And this is no hardship, because the trial before the traverse jury will always sufficiently protect the rights of a defendant.

It is said that the 27th section of the Revised Statutes referred to, only applied to persons brought into court on recognisance. But the 28th section applies to every person. "No challenge," that is, by any person, "shall be allowed," but for the two causes mentioned in the 27th section.

This regulation is, under the Acts of Congress, and the rules of court made in pursuance thereof, applicable to the Federal courts. (Rule 46, District Court, Conk. Tr., 2d ed. 541; Rule 3, Circuit Court, Ib. 528.)

The objections made here to the mode of designating the grand jurors, that one of them was a volunteer, that there was no order for a *venire*, and that there was no *venire* or precept, all come under the head of a challenge to the array, and are covered by the 28th section of the Revised Statutes.

Charles B. Sedgwick, in reply. 1. The Act of Congress of 1840 does not include regulations made by the State statute in regard to challenges, nor does the 46th rule of the District Court apply to grand juries. 2. Admitting the 27th and 28th sections of the Revised Statutes to be applicable to the Federal courts, they do not embrace the objections raised in this case.

Challenges both to the array and to the polls are to be taken before the swearing of the jury. A challenge to the array is made on account of favor, bias, or relationship on the part of the officer who summons the jury, but never on account of any irregularity or want of process.

There is a distinction between a challenge and a motion to set aside an indictment for irregularity. A challenge is to be brought before the court at a given point in the course of the proceedings, and to be then entirely disposed of. A want of process always appears by the record. A challenge does not. A want of process may be taken advantage of by error or *certiorari;* what is a ground of challenge cannot be. The want of a *venire* is not a ground of challenge to the array. (1 Chitty's Crim. Law, 533); *The People* v. *McKay*, (18 Johns, 212); *Nicholas* v. *The State*, (2 Southard, 539); *Chase* v. *The State*, (1 Spencer, 218); *The State* v. *Williams*, (1 Richardson, 188.)

The State statute limits the right of challenge to narrow bounds, and if, in consequence, all irregularities which occur before the grand jury are actually sworn are cut off, there is no way of reaching some of the worst evils. It is no answer to say that the rights of a party will be protected, because he will have his trial before the petit jury. This view strikes at the provision of the Constitution which requires a due presentment by a grand jury before trial. Every safeguard of the liberty of the citizen should be maintained, but, according to the construction of the prosecuting attorney, no forms are of any importance, if only the defendant be fairly tried by the petit jury.

If a *venire* is required, it is the foundation on which the grand jury stands. If it be wanting, there is no ground for challenge, but the grand jurors have no right to act, and their proceedings are a nullity.

Under the 27th section of the Revised Statutes, a person previously held by recognisance is the only one who can make the challenges specified. If it be held that that section embraces other persons, then those others would be

cut off without an opportunity of making even the objections specified. It is said that the 28th section enlarges the exclusion. But the two sections are to be construed together. If a person not held to answer cannot challenge, or obtain relief by motion, but is shut out forever, then the provision of the Constitution that a person charged with crime must be regularly presented by a grand jury, is entirely brushed away.

If, however, the court should be against us on these objections to matters occurring before the impanelling of the grand jury, we still have some objections to discuss in regard to matters which arose after the impanelling of the grand jury.

NELSON, J. We have looked into the question which we suggested to the counsel yesterday, and to which we desired them to turn their attention, and are prepared to express our opinion upon it. The question is, perhaps, somewhat a new one, in the aspect in which it has been presented. But the general principle, that is, the adoption of the state regulations in designating, summoning and returning grand jurors, is, so far as it is involved, not new, but has always prevailed in the Federal courts since their organization. The Judiciary Act of 1789, (1 U. S. Stat. at Large, 88, § 29,) the Act of May 13th, 1800, (2 U. S. Stat. at Large, 82,) and the Act of July 20th, 1840, (5 U. S. Stat. at Large, 394,) adopt the state regulations in respect to the procurement of grand and petit jurors to serve in the Federal courts, and each of those acts, especially the Act of 1840, applies to the Federal courts, in express terms, the state regulations respecting the qualifications and the exemptions of grand and petit jurors.

The question in the present case is, whether or not the provisions of the State Act, (2 R. S. 724, § 27, 28,) which regulate the rights of a prisoner in the challenging of grand jurors, are applicable to the organization of grand juries in the Federal courts. Those provisions are as follows:

"§ 27. A person held to answer to any criminal charge, may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpœnaed or been bound in a recognisance as such; and if such objection be established, the person so summoned shall be set aside.

"§ 28. No challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified in the last section."

We entertain no doubt that these two sections bear upon the question of the qualifications of grand jurors and their competency to serve as such. If this be so, it follows that the regulations prescribed by these sections come directly within the Act of 1840, which, in express terms, adopts the State Acts in regard to the qualifications and exemptions of grand jurors.

A challenge to an individual grand juror may be made on behalf of a prisoner, on the grounds that he has not the requisite freehold qualification, or that he is not of competent age, or that he has formed a fixed opinion of the guilt of the accused, or that he is his enemy, and various others which it is not necessary to enumerate. It is too obvious to require any argument, that the challenges to an individual grand juror for favor, which are prescribed in the two sections in question, go directly to the qualifications of the juror as a fit and competent person to serve in that capacity.

The challenge to the array, at common law, or according to the English understanding and definition of that term, is founded on the allegation that the sheriff who summoned the grand jury was an improper and unfit person to discharge that duty, as by reason of his being related to one of the parties — his relationship to the prisoner being a ground of challenge on the part of the King — and it being a ground of challenge by the accused that the sheriff is his enemy, or that the relations between them are such, that in view of a proper administration of justice, the sheriff is not a proper person to summon the grand jury who are to be the triers of the accused. It being thus a ground of a challenge to the array, in a given case, that the jury have been selected, summoned and returned by a person unfit to summon an indifferent jury to sit and judge in the case, and it being the presumption that such a person would summon a jury not indifferent, but prejudiced, as respects the case to be heard, the challenge to the array, so authorized, necessarily, though perhaps more remotely, touches and reaches the proper qualifications of the panel to sit and act in the particular case.

So that, in point of law, as well as in truth, both the

challenge to the favor and the challenge to the array, directly or indirectly, in each case, go to the determination of the proper qualifications of grand jurors, either as individuals or as a panel. And, if we are right in our premises, it follows that the two sections in question are directly within the Act of Congress of 1840, and are applicable in regulating the selection, summoning, returning and organization of grand juries in the Federal courts.[1]

Whether the fact that a *venire* or a precept has not been issued by the proper authority, in cases where it is required by law for the purpose of summoning and returning a grand jury, is a ground of challenge to the array, may be, perhaps, an open question, or one admitting of some observation and doubt. We are inclined to think, however, that if an objection were made on that ground, at the proper time, it might be made as a challenge to the array. Because, in judgment of law, if a grand jury has been summoned and returned by a person who is not authorized to designate, summon and return the panel, the array of the jury thus summoned and returned would seem to be objectionable as a panel, and therefore objectionable under a challenge to the array or to the panel. If, then, the absence of a *venire* or of a precept, in a case where the law requires one, is a ground of challenge to the array, which we are inclined,

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[1] The principles here laid down are not applicable to peremptory challenges in criminal cases in the courts of the United States. Such challenges in those courts are regulated by the common law. *United States* v. *Marchant*, (12 Wheat. 480); *United States* v. *Wilson*, (1 Baldwin, 78.) The Acts of Congress on the subject of jurors do not regulate peremptory challenges to jurors in criminal cases. The 29th section of the Judiciary Act of 1789, (1 U. S. Stat. at Large, 88,) enacts that "Jurors in all cases to serve in the courts of the United States, shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens, to serve in the highest courts of law of such state;" and the Act of July 20th 1840, (5 U. S. Stat. at Large, 394,) provides that "Jurors to serve in the courts of the United States, in each state respectively, shall have the like qualifications and be entitled to the like exemptions as jurors of the highest court of law of such state now have and are entitled to." A peremptory challenge not being made for any assigned cause, and having no reference to the qualification or exemption of the juror, the Acts of Congress above referred to, do not cover it. And the 34th section of the Judiciary Act of 1789, (1 U. S. Stat. at Large, 92,) which provides that "The laws of the several states except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply," does not apply to criminal cases. *United States* v. *Reid*, (12 Howard, 361.)

upon principle, to think it is, the challenge is abolished by section 28 of the statute referred to, and it is, consequently, also abolished in the Federal courts.

It is very probable that the legislature of New York were induced to abolish the challenge to the array on account of the change from the English mode in the system adopted for the purpose of designating and summoning grand jurors. In England, and so it was in the Federal courts until the Act of Congress was passed adopting the state regulations, the sheriff, on receiving the *venire*, makes a selection of the jurors from the body of the county at his discretion. Hence the importance that is there given to the proper qualifications of the sheriff, in respect to the parties concerned, to summon the jury; because, if he is disposed to summon one to accomplish a particular object, it is entirely within his power to do so. But, according to the system prevalent in the state of New York, the law provides for the selection of the members of the grand jury with great care and particularity. In the first place they are selected from the body of the county by the board of supervisors, and separate ballots containing their names are placed in a box kept by the clerk of the county, from which the requisite number are drawn by lot to form the jury, and the names so drawn are the persons to be summoned and returned. If, therefore, the law is complied with in the selection and summoning of grand jurors, none of the officers employed in the discharge of that duty can exercise any discretion whatever, and hence, no doubt, the legislature came the more readily to the conclusion that the right of challenge to the array was not of the same importance under our system as under the system that prevails in England.

We are quite free to say, however, that although the challenge to the individual members of the grand jury for favor is abolished, except in the two cases specified in sections 27 and 28 of the statute referred to, and although the challenge to the array is wholly abolished, it by no means follows that the accused has no remedy in a case where there has been any improper conduct on the part of the public officers employed in the designating, summoning and returning of the grand jury. If there has been any improper conduct on the part of those officers in performing that service, or if any fraud has been committed, through their instrumentality, in the drawing, summoning or organization of the grand jury, of course, the accused, who may

be prejudiced thereby, has his remedy, by motion to the court, for relief in consequence of such irregularity or fraud. Because, the selecting, summoning and returning of grand jurors are proceedings which are always under the general supervision and control of the court, and the court will guard them, and will see to it that no one shall be prejudiced thereby. The court has general power to preserve the pure administration of justice, and its sound discretion will always be exercised freely for the purpose of securing that end.

These objections, however, to the proceedings in the selection and summoning of grand jurors, over and beyond the right of challenge, are presented to the court for the exercise of its sound discretion. It will, therefore, look into the facts presented, on which a charge is made against the regularity of the proceedings, in the selection and summoning of grand jurors in a given case, and will hear the explanations on the other side, and its judgment will be determined accordingly. If it sees that there has been improper conduct in the public officers, which has resulted prejudicially to the party accused, it is bound to set aside all the proceedings. On the contrary, although there may be technical objections to the proceedings in point of strict regularity, yet, unless the court is satisfied that they have resulted or may result to the prejudice of the party accused, it will not set them aside, because its interposition in the case will not be required on the ground of justice either to the accused or to the public.

We are inclined to think that, whether or not the absence of a *venire*, where it is required by law, forms a ground of challenge to the array, is of no practical consequence in this case; because, even if it were a ground of challenge to the array, and the party had not made the challenge, not having had notice of the facts on which it could be grounded, yet if it could be shown that corruption or fraud had entered into the selection, summoning or returning of the grand jury, the court would hear an application for relief founded upon its power and duty to control and regulate the proceedings so as to prevent injury and oppression. The only difference between the two cases is, that where a challenge to the array is made, it is, if maintained, fatal to the panel, and the panel becomes invalid by operation of law; but where the party is obliged to make a motion to set aside the panel on the ground of improper conduct on the part

of public officers, there is then no inflexible rule of law applicable to the case, but it rests in the sound discretion of the court to see that no injury results from the impropriety. The court will look, therefore, into the facts, to see whether there is any thing to satisfy their minds that the jury thus summoned is not a fit body to exercise the powers conferred upon it.

If the absence of a *venire* is not a ground of challenge to the array, the result is still the same. The conduct of public officers in summoning the jury, if improper, is not thereby protected, and the injured party has his remedy by motion. In either case the appeal is to the discretion of the court.

The Act of Congress of 1840, in connection with the 46th rule of the District Court for this district, provides for the designation, summoning and returning of grand jurors without any *venire* or precept of any kind. Such has been the practice in this district ever since the adoption of the 46th rule, no doubt on a sound construction of the Act of 1840. That act conferred full authority on the District Court to adopt the 46th rule, which simply requires a notice by the clerk, within a proper time, to the marshal, to summon the jurors. The marshal then draws and summons them according to the state regulations as far as practicable, and makes a return on the jury list, which is filed, and which furnishes all the authority necessary for impanelling the jury.

Were it not for the Act of August 8th, 1846, (9 U. S. Stat. at Large, 73, § 3,) no question would arise as to a *venire*. The Act of 1846 changed the law as it then existed, but the obvious extent of that change, as designed by Congress, and as appears from the face of the law, was to remove the necessity that previously existed of summoning a grand jury at every term of the circuit and district courts, with a view to diminish expenses. Therefore the act provides that no grand jury shall be summoned for any term of a circuit or district court unless the judge in the exercise of his discretion, or on the application of the district attorney, shall order a *venire* to be issued to summon a grand jury. Now, although the purpose of that act was to get rid of the necessity for the regular attendance of a grand jury at every term, and it, therefore, devolves power on the judge to order a grand jury when necessary, yet it does provide in terms that a grand jury shall be summoned by

an order for a *venire* to be made by the judge. And, undoubtedly, in compliance with the terms of that act a *venire* should be issued by the clerk of the court in pursuance of the order of the judge. For, although the act only says that there shall be an order for a *venire*, yet it implies that a *venire* shall issue in pursuance of the order.

In this case, a verbal order for a *venire* was given to the clerk. If he had fulfilled his duty he would have entered it on the records of the court. What the clerk does by the authority of the judge is done by the judge himself. It is not necessary that the judge should put an order on file, but an order, if entered by the clerk, is of the same effect as if it were entered by the judge with his own hand. Here, an order was made by the judge, and the only point of objection in the case is the omission by the clerk to issue a *venire*. If the omission of the *venire* were a ground of challenge, and the party had availed himself of it at the proper time, it would have been fatal. But, if not a ground of challenge, or if the time for making the challenge be past, then it is only a ground for a motion to the court to set aside the panel for cause shown. But, the mere technical omission on the part of the clerk to issue a *venire*, is, of itself, no cause for the action of the court, where the appeal is not to the application of an unbending principle of law, but to the sound discretion of the court. The general principle is, that the omission of an officer to do his duty will not be allowed to operate to the prejudice either of an individual or of the public, unless it is shown to have operated to the prejudice of the party who complains of the omission.

It has been urged by the counsel for the prisoner, that the 27th and 28th sections of the statute referred to apply only to persons who have been arrested and held to bail, to appear at the term of the court at which the grand jury attends, to answer such complaints as may be presented against them. That is true, and they are the only persons who can challenge either the array or the individual jurors for favor; because these challenges must be made at the time the grand jurors are called and impanelled, and only those persons who are bound over to appear have the right or the opportunity to make either of these challenges. At common law, persons not bound over never had the right or the opportunity to challenge either the individual grand jurors or the array. Hence those persons could never avail themselves

of any improper conduct in summoning or returning the grand jury, except by way of motion addressed to the sound discretion of the court, to prevent any prejudice to the rights or interests of the accused.

From these views it results that the question at this stage does not stand upon the doctrines applicable to challenges, but upon the allegation on the one side and the denial on the other, that the grand jury has been drawn, summoned and returned improperly or through fraud, and in a way that has resulted to the prejudice of the accused, and that the court is, therefore, bound, in the exercise of its sound discretion, to look into the proceedings. The question will turn on the aspect of the case as presented by the affidavits on the part of the accused and those upon the other side; and we shall be obliged to determine it upon our view, not of the technical irregularities and objections, but of the case generally, as respects justice between the individual and the public. If we shall be satisfied that there was nothing in these proceedings, although they may have been irregular, which could work to the prejudice of the accused, we cannot, in the exercise of a sound discretion, set them aside. If, however, we shall be satisfied that they have worked injustice, we shall be bound to interpose.

There are two or three questions presented by the counsel for the prisoner which are not embraced in the view we have taken, that the proceedings in question must be regulated by the provisions of the Revised Statutes of New York in respect to challenges. Those questions are founded on matters arising after the impanelling of the jury, and are open for observation without regard to the application of any one of those provisions. Upon those questions we are, of course, disposed to hear any observations that counsel may desire to present, as we are also ready to hear any views they may desire to present in regard to any prejudice or injustice that has been suffered through the manner in which the jury has been designated, summoned and impanelled.

Hillis then proceeded to argue that the defendant might have been and was prejudiced by the mode of designating the grand jurors. [NELSON, J. The right of challenge in this case being cut off, the remedy of the party is narrowed to an appeal to the sound discretion of the court, in case any irregularities have occurred in drawing or summoning the grand jury, which may have operated to his prejudice.

But the good faith of the officers concerned in discharging the duties of drawing and summoning must be implicated.] We insist that if an officer puts himself in motion to summon a grand jury without a *venire*, the question of his good faith in doing so is involved. [NELSON, J. We have held that the question as to the *venire* is not open. The counsel, in order to avail himself of the ground left open, must present a case in which he implicates the good faith of the officers concerned in selecting, summoning and returning the grand jury.]

The box from which the ballots in this case were drawn, instead of having a small hole in its top for that purpose, had a sliding cover, and when that was drawn out the ballots were in full view of the person drawing. Nor were the ballots folded so as to render the names invisible as required by the statute. (2 R. S. 721, § 6.) These were irregularities which would almost surely work to the prejudice of the defendant, in a case where the officer drawing had any feeling in the matter. [NELSON, J. How can the officer be held responsible for the construction of the box and the formation of the ballots? He has no control over them. He is to take the box furnished by the state officers. He has no right to fold the ballots, or interfere with them in any way, except to draw them. He must take the state ballots. The Act of Congress having adopted the state box and the state ballots, and made it the duty of the officer to draw, we do not see how it can be objected that the ballots were drawn from that box and from among those ballots.]

I pass now to irregularities in the proceedings after the grand jury was sworn and impanelled.

A son of the district attorney, not sworn in any manner, was permitted to mix with the grand jury while they were in session, and to participate in the proceedings before them. Such a practice destroys the secrecy of the institution of the grand jury, which is its most important feature. No person should be permitted to be present at their sessions except the witnesses and sworn officers of the court. [NELSON, J. The only point that can arise on this branch of the case is, whether the person admitted to the grand jury was guilty any of improper conduct while there, which operated unduly on the minds of the jurors. It is the uniform practice in the Federal and State courts for the clerk and assistant of the district attorney to attend the grand jury,

and assist in investigating the accusations presented before them. That has been the practice, to my knowledge, without question, ever since I have had any connection with the administration of criminal justice. In England, even the prosecutor may appear before the grand jury and aid the representative of the Crown in respect to the evidence and the management of the case. We cannot, at this late day, overturn a uniform practice that has beeen settled for so long a time. You must assume that the attendance of the clerk of the district attorney before the grand jury, to aid in bringing out the testimony, is admissible. But if any abuse has been committed by him or by any other person, it is a proper subject for investigation by the court.] We charge no abuse, except the mere fact of his being present.

The next point is, as to the oath administered in open court to the witnesses who testified before the grand jury. They were sworn in this manner: "You and each of you do severally solemnly swear, that the evidence you shall give to the grand inquest, touching charges against Moses Summers and others, concerning which you shall be interrogated, shall be the truth, the whole truth, and nothing but the truth. So help you God." Upon the testimony given under this oath twenty-four bills of indictment were found against twenty-four different persons, one against each. No indictment was found against "Moses Summers and others," nor was any indictment found against any two persons jointly. Could any person who swore falsely against the defendant be indicted for perjury on this oath? The witnesses were not sworn at all so far as the defendant was concerned, and the indictment against him was found on testimony, not on oath. *Smith* v. *Clark*, (12 Howard, 21); 1 Chitty's Crim. Law, 322; *United States* v. *Coolidge*, (2 Gallison, 364.) The oath here was not a general oath, naming no person, and swearing the witnesses as to any matters they might be inquired of before the grand jury. But it was a particular oath confined to a particular cause. And an indictment will be quashed unless the witnesses are regularly sworn. (6 Carr. & P. 90); *State* v. *Roberts*, (2 Dev. & Batt. 540); (Wharton's Crim. Law, 124); *State* v. *Cain*, (1 Hawks. 252); *State* v. *Fellows*, (2 Hayward, 340); *The People* v. *Hulbut*, (4 Denio, 133.)

Another objection we have to urge is, that *ex parte* affidavits were used before the grand jury instead of oral

testimony. Those affidavits were made originally for the purpose of issuing warrants against the parties accused. On the examination of the parties after arrest, the same affidavits were again used. And they were used a third time before the grand jury, where they were read and the witnesses asked if the statements in them were correct. This was an irregularity. In an *ex parte* investigation as to a person not present, the witnesses should have been interrogated as to what they remembered concerning the transaction. [NELSON, J. Have you any authorities that go to permit an inquiry into the mode of proceeding before the grand jury in the taking of testimony, or into the weight or sufficiency of the testimony, for the purpose of invalidating an indictment? As regards the manner of swearing the witnesses, when they are sworn in open court, and the competency of the evidence, whether oral or documentary, and the manner of the authentication of the latter species of evidence, we can inquire. But, so far as regards the mode of conducting the examination of witnesses who are properly before the grand jury, we are aware of no principle which authorizes us to revise the proceedings of the grand jury. Now, the affidavits in question here were, as we understand it, used before the grand jury in the course of the examination of the witnesses themselves who made the affidavits. The witnesses were called to testify in regard to facts about which they had previously made affidavits. The affidavits were used to refresh their recollections and to save time. The witnesses, being present before the grand jury, were to be examined according to the discretion of that body, over which we have no control. It is no new practice for witnesses to consult, for the purpose of refreshing their recollections, statements which they have previously made, although they cannot swear from the statements. There is no objection, however, to the witnesses swearing that certain facts, of which they have previously made statements on paper, are true.]

Again. An *ex parte* affidavit, purporting to have been taken in Missouri, and to have been made by the alleged owner of Jerry, was the only evidence before the grand jury that Jerry was a slave, that he owed his alleged owner service, that he escaped from Missouri to New York, and that the person rescued was the identical Jerry who escaped. [NELSON, J. Evidence before a grand jury must be competent legal evidence, such as is legitimate and proper before

a petit jury. *Lawrence.* The affidavit of the owner referred to was annexed to the warrant and was the same affidavit that was used before the United States commissioner, and on which he issued his warrant in the case. It was produced before the grand jury by the commissioner himself, who was sworn as to the issuing of the warrant upon it, and the only object for which it was used before the grand jury was to show what the commissioner who issued the warrant had before him, with a view of showing that he had jurisdiction to issue it, and that it was valid in the hands of the officer, and that the rescue was in violation of the Act. NELSON, J. Can a motion to quash an indictment be made on the ground that the grand jury found it on insufficient evidence, or even without any evidence as to any particular point? Can you produce any authority for setting aside an indictment on that ground?] In *Low's case*, (4 Greenleaf, 439,) the affidavit of a grand juror was received to show that an indictment was found by less than twelve of the jury. In *United States* v. *Coolidge*, (2 Gallison, 364,) an indictment was set aside on the ground that it was found on the evidence of witnesses who had not been sworn at all. [NELSON, J. In this last case the inquiry was in regard to a fact that transpired, not before the grand jury, but in open court. HALL, J. The affidavit of the party here as to the alleged defect in the evidence before the grand jury, is merely on information and belief. If objection be made by the defendant, no affidavit of a grand juror, or of the district attorney, or of any person who was present before the grand jury, can be used to rebut it. If, in such a case, an affidavit on information and belief be held sufficient, every indictment must be quashed. I am aware of no case where any court has ever re-examined the evidence before the grand jury to see whether it was sufficient. The result of such a practice would be, that in every case the court would be obliged to try a party on affidavits on a motion to quash the indictment.] Affidavits of grand jurors are always admitted to sustain an indictment. Besides, in this case, the affidavits on the other side admit our allegation, as to the defect of evidence, to be true, by not denying it. [HALL, J. Can you show, by authority, that the affidavit of a grand juror is competent for the purpose of showing that sufficient evidence was given to find the indictment? The position that your allegation is admitted because it is not denied, begs the question, which is, whether

your affidavit is sufficient to call for either an admission or denial. You can have no legal information as to the fact that there was no evidence before the grand jury. The indictment itself is evidence that it was founded upon snfficient testimony, while you are speaking upon information and belief and mere hearsay, on a subject as to which you can legally have no information. And this, you maintain, shall control an indictment presented by a grand jury upon oath.] The doctrine suggested would go so far, if carried out, as to allow no remedy, even if it appeared that there was no proof at all before the grand jury on which to find an indictment.

Spencer, for the United States. All the questions raised by the defendant have been disposed of except three. 1. As to the oath administered to the witnesses. 2. As to the affidavits used before the grand jury. 3. As to the want of sufficient evidence on which to find the indictment.

1. As to the oath, the argument of the defendant has proceeded on the assumption that a suit was pending between the Government and the defendant at the time the oath was administered. This is a mistake. The proceedings were merely initiatory. It was wholly unknown who would be implicated in the transaction.

The oath was equivalent to a general oath, which is sufficient. *Ward* v. *The State*, (2 Missouri, 120.) It required the witness to speak the truth as to any matter about which he should be interrogated before the grand jury. The oath related to the matter, and it was not necessary it should be limited to any particular individual.

It is objected that separate bills were found against the several parties implicated. The transaction was a misdemeanor, in which all were principals, and all jointly and severally liable for every thing that was done while they were acting in concert. Whether the indictments would be joint or several was unknown, and was a matter within the election of the district attorney, and could make no difference in the deliberations of the grand jury.

The investigation was, as to one entire transaction, a simple proceeding, and the oath was, to give evidence as to any matter about which the witness should be interrogated, in relation to that transaction, respecting Moses Summers and all others who might have been engaged in it.

It is said that perjury could not be predicated on this oath.

This is not so. It would sustain a count that false evidence was given against the party who complains. The witnesses were bound to speak the truth in regard to each and all of the persons concerning whom they should be interrogated.

The oath administered was the only one which could have met the exigency of the case. It cannot be that the the grand jury are to suspend their proceedings, and that a witness is to stop in his testimony, every time a new name is introduced, in order that the witness may be sworn as to that particular individual.

2. As to the use of affidavits before the grand jury. Each affidavit became common law evidence the moment the witness said that the statement to which his name was signed was true. The affidavit was not read to the grand jury as an affidavit. But it was read to the witness, and, when he said it was true, the evidence was the same in legal effect as if given orally. It was only a brief way of examining the witness.

3. The last point is not open for inquiry. The question whether there was sufficient evidence before the grand jury on which to find the bill is a field into which the court will not enter. It is a startling proposition, that a court is to be allowed in every case to inquire whether, on the whole, the grand jury were warranted in finding a bill.

The question here is not whether the bill was found without any evidence, but whether it was found on sufficient evidence. The indictment, presented on oath and a matter of record, is conclusive evidence that it was found on sufficient testimony. It is only before the traverse jury that the evidence can be gone into again. When the grand jury admit improper evidence and abuse their trust, the court sometimes interferes. But the door is not open to inquire whether there was sufficient evidence on which to find the bill.

In *Low's case*, (4 Greenleaf, 439,) where the bill was found by less than twelve of the grand jury, they had no jurisdiction, and consequently the indictment was no indictment.

But the allegation that the evidence was not sufficient is made only on information and belief. Can the court inquire into the matter on the mere suggestion of the party? What, in such case, becomes of the presumption that every public officer discharges his duty? We are under no obli-

gation to speak in answer to such an allegation. The law does not presume that we have the means of speaking.

But the indictment contains two sets of counts — one set founded on the allegation that Jerry was a fugitive — the other on the allegation that he was an alleged fugitive, and that proceedings were in progress to determine the fact. There is no pretence that the evidence was not sufficient to support the latter class. (Roscoe's Crim. Ev. 233; Wharton's Crim. Law, 133); *Resp* v. *Cleaver*, (4 Yeates, 69); *State* v. *Baldwin*, (1 Dev. & Batt. 198); *State* v. *Mathis*, (3 Pike, 84.)

Sedgwick, in reply. There is a distinction between the oath here and a general oath. In an indictment for perjury the oath must be stated exactly as it was administered; and, under the oath here, if an attempt were made to prove that the witness swore falsely in a proceeding against the defendant, the variance would be fatal.

There was here no joint indictment, and the oath was taken in a case in which no indictment was found, and no oath was taken in the case against the defendant. The oath was not equivalent to a general oath.

As to the admission of incompetent evidence. The accused has no access to the grand jury-room to obtain proof. He cannot compel, nor will the court permit the grand jurors to disclose what took place before them. Nor can he compel the district attorney or his clerk to give their affidavits as to what transpired in the grand jury-room. The only way then that a party can know of an irregularity is by information and belief, and all that is left to him is to make a suggestion to the court. If, then, incompetent testimony vitiates an indictment, and if the only mode of reaching the question is by a motion to quash, and if the affidavit of the party on information and belief is the only foundation that can be had for the motion, then such an affidavit requires an answer from the district attorney, who can call on the grand jurors to give evidence in reply, and can give it himself.

No witness was produced before the grand jury as to the ownership or escape of the slave. The only evidence on those points was by affidavit. The case was not one of insufficient evidence, but of a want of evidence as to vital points.

Nelson, J. Several of the questions raised on this motion on behalf of the defendant to quash the indictment,

having been already disposed of in the course of the argument, we shall only refer to those remaining, and which are deemed worthy of notice.

The first is in respect to the oath administered to the witnesses who were sent before the grand jury. They were sworn in open court, on a criminal charge against several persons for a participation in the rescue of a person from the hands of a public officer who held him in custody, and in the following manner: The clerk of the court was furnished with a general description of the persons accused, —"*The United States* v. *Moses Summers and others*," —and then administered to the witnesses in due form an oath, as follows: "You and each of you do severally solemnly swear, that the evidence you shall give to the grand inquest, touching charges against Moses Summers and others, concerning which you shall be interrogated, shall be the truth, the whole truth, and nothing but the truth. So help you God." The argument is, that this oath was void, as it respected all the persons accused before the grand jury, or, at least, as it respected all, except the one particularly named; and that the evidence, therefore, given before that body, and upon which the indictment was founded, was not delivered under the sanction of an oath.

It was admitted on the argument, and we suppose there can be no doubt as to the correctness of the position, that a general oath, to give evidence touching criminal charges to be laid before the grand jury, without reference to any particular person, would be unobjectionable. This seems to be the practice adopted in some of the state courts. But it is supposed that the description attempted to be given of the persons accused, in the instance before us, and to which the oath refers, vitiates it.

It is true, if this description had embraced one or more persons by name, whose cases were about to be laid before the grand jury, and in respect to which the oath was administered, and nothing more, the objection would have been well founded, so far as concerned evidence given in support of any accusation against others. It must then have been confined to complaints against the persons specified. But, in the case before us, the oath was not restricted to any specified number of persons mentioned, or to the single person named. The witnesses were sworn to give evidence touching charges against him, and any other persons concerning whom they should be interrogated by the

grand jury. And, if a general oath to give evidence touching charges against any and all persons, concerning whom they might be thus interrogated, would be unexceptionable, of which we think there can be no doubt, it would seem difficult to maintain the objection made to the oath in this instance. It is no more general and unrestricted, as it respects the persons against whom complaints may be made before the grand inquest, in the one case, than in the other, but applies to every complaint presented for examination.

There are no authorities to be found in the English books upon this question; as the mode of proceeding before the grand jury in finding bills of indictment differs from the practice usually adopted in this country. There, the indictment is drawn by the proper officers before the case is presented for examination, and the witnesses are sworn in the particular case. Here, the initiation of the proceedings is by swearing the witnesses and sending them before the grand jury, and the bill is drawn after they have agreed upon it. There is no cause pending in court, or even before the grand jury, in the legal sense of the term, at the time the witnesses are sworn, and, in consequence, no title to the proceedings can properly be given, or be necessary to the validity of the oath. If the person to be accused before the grand jury is named, it is simply for the purpose of giving application to the oath, or to the evidence under it; and, as we have seen, this application has been regarded as sufficiently direct and explicit when the oath is administered generally, and as relating to all persons concerning whom charges are to be made before that body.

Indeed, if the description of the case given to the clerk could be properly regarded as a title to the proceedings, in a technical sense, there might be some difficulty in maintaining the validity of the oath to these witnesses, as no such proceeding was then pending in contemplation of law. An affidavit taken in a suit in which the title is given, is invalid, if no such suit is pending. But we do not regard the memorandum given to the clerk, as already referred to, in this case, or in any other, even where the accused are all specially named when the oath is administered, as a title within the technical meaning of that term; but, as used, simply for the purpose of giving application to the oath, and to the evidence to be given thereafter under it. And, as the oath may be general as it respects all persons who may be accused, it would seem to follow, necessarily,

that the form in which it was administered in this case is not liable to any well founded objection.

Another ground taken in support of the motion to quash the indictment is, that there was no evidence laid before the grand jury tending to prove that Jerry was a person held to service in the state of Missouri, or that he was a fugitive from such service at the time of his arrest and detention by the officer, when the rescue took place, and that for this cause the indictment is founded on insufficient evidence, and, as it respects this fact, in the absence of evidence.

The indictment contains two classes of counts — one embracing an averment of these facts — and the other omitting this averment, and resting the counts upon a statement of facts showing that the magistrate had jurisdiction of the case, the issuing of the warrant, the arrest, &c.

The affidavit upon which this ground for sustaining the motion is founded, charges the absence of this evidence before the grand jury upon information and belief only — a charge, as is obvious, that may be readily made by the accused in any case where an indictment has been found, and which, if maintainable on such an allegation, might devolve upon the public prosecutor and the courts, in all cases, the necessity of going into the evidence before the grand jury, for the purpose of re-examining and revising the adjudication of that body; and this, without any authentic record of the evidence produced before them, or any means of arriving at that evidence. They are not bound to keep a record of the evidence taken before them, and are prohibited from disclosing their proceedings, and so, also, are all other persons who have access to, or are permitted to participate in those proceedings. They are allowed by statute in some of the states, to testify whether the testimony of a witness examined before them is consistent with or different from the evidence given by him before the court, and also, upon a complaint for perjury, or upon a trial for that offence, to disclose the testimony given by any such witness; and, perhaps, evidence in these cases might be given by them at common law, and without the aid of the statute. It is even doubtful whether they will be allowed to disclose the fact that a bill of indictment was found by a less number than twelve of their body, the authorities being contradictory. *The King* v. *Marsh*, (6 Ad. & Ell. 236); *Low's Case*, (4 Greenl. 439); (Roscoe's

Crim. Ev. 192); *The People* v. *Hulbut*, (4 Denio, 133); *Cooke's case*, (8 Carr. & P. 582); *The People* v. *Jewett*, (3 Wend. 314); (Wharton's Crim. Law, 129.) The rule is founded upon public policy, to guard against abuses that might arise from a disclosure of their proceedings to the accused, and to protect witnesses who may have given evidence before them, from being exposed to the ill-will and resentment of parties indicted. The permission to disclose in the case of a complaint for perjury, or for the purpose of contradicting a witness, seems to remove every well grounded objection to the rule.

No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint; and the grounds and reasons which we have briefly alluded to, account sufficiently for the absence of any such precedent.

The unfitness and inconvenience of an inquiry into the evidence before the grand jury, in this *ex parte* and informal manner, afford, also, strong grounds of objection to any such practice. The re-examination and revision of the evidence before them, attempted to be established by *ex parte* statements, and upon the allegation of information and belief by interested parties, would necessarily lead to abuses in the administration of criminal justice, besides involving it in endless and profitless litigation. It presupposes improper, if not dishonest conduct, in the members constituting the body, and seeks to establish the fact in this loose and imperfect mode of arriving at the truth, and under circumstances in which the jurors themselves are precluded from vindicating their proceedings. For, it was well remarked by the learned judge who delivered the opinion of the court in the case of *The People* v. *Hulbut*, (4 Denio, 133,) upon this subject, that "The evidence which the defendant proposed to give could amount to nothing less than an impeachment of the grand jurors. They had found a bill charging the defendant with five different offences, and the substance of the offer was to show that only one offence had been proved before them." "It cannot be proper," he further observed, "to allow the jurors to be thus assailed. To permit the ques-

tion to be tried over again in another place, whether the indicting jurors had sufficient evidence, or any evidence, to warrant their finding, would be plainly contrary to the policy of the law, which, in every thing that may affect the jurors themselves, has placed the seal of secrecy upon their proceedings." These remarks were made in a case where the evidence to impeach the proceedings was offered on the trial, a mode much less exceptionable in arriving at the truth, than upon *ex parte* affidavits.

In the administration of criminal justice, confidence must be reposed somewhere; and it must be admitted that there are few bodies concerned in it, that may be more safely trusted than the grand inquest of the county. They are selected for their intelligence, probity and character, from the whole body of the county. In the county of Erie, whence this jury were drawn, the list out of which it was selected, is limited to the number of three hundred, ina population of some one hundred thousand; a fact that more strongly illustrates the high character and qualifications of the grand inquest of the county for the discharge of the important duties devolved upon them, than any remarks we could make.

But, assuming that we may be mistaken in these views, there is another, which it is proper to notice, equally decisive of this motion. We have already stated that this indictment contains two classes of counts, and that one of them rests upon a statement of facts, showing that the magistrate had jurisdiction of the case to issue the warrant, the issuing of the same, the arrest, &c. If this class of counts is well founded, and of which we entertain no doubt, then the indictment must be sustained, even conceding the absence of the evidence as alleged by the affidavits upon which the motion is founded.

By section 6 of the Act of September 18, 1850 (9 U. S. Stat. at Large, 463), it is provided, that when a person held to service, &c., shall escape, &c., the person to whom such service is due, &c., may pursue and reclaim such fugitive, either by procuring a warrant from some one of the courts, judges, or commissioners, for the apprehension of such fugitive, &c., or by seizing and arresting such fugitive where the same can be done without process, and by taking or causing him to be taken forthwith before such court, judge or commissioner, whose duty it shall be to hear and determine the case of such claimant, &c. If the facts, as

presented before the commissioner, brought the case within his jurisdiction, and authorized the issuing of the warrant for the arrest, then the ministerial officer had full authority to make the arrest, and was bound to make it; and any person who knowingly rescued, or attempted to rescue the fugitive from the custody of such officer, or aided, abetted or assisted in such rescue, was guilty of the offence charged in the indictment. The person thus arrested under the warrant is in the custody of the law, and any one engaged in the attempt to take him forcibly out of such custody subjects himself to its penalties. When the warrant is issued by the authority of the law, it is made the duty of the marshal, and deputy marshal, under heavy penalties, (section 5,) to obey and execute it; and it would be absurd to hold, that such officer could not be protected in the execution of the process, when the proof before the magistrate was sufficient under the statute to confer jurisdiction to issue it. In this, as in every other case of legal proceedings of an analogous description, it is sufficient to justify the arrest and detention of the person in custody, until he is discharged by due course of law, that the warrant was issued by competent authority. The officer must be protected in its due execution, if the law of the land is to prevail; and any person concerned in the endeavor to obstruct it, or to take the person arrested forcibly out of his hands, becomes a public offender, and liable to the punishment the law annexes to the offence.

The question, whether the person is a fugitive from service or not, or whether such service is due to the claimant or not, is a question, the authority to determine which, at the final hearing, is conferred by law upon the magistrate issuing the warrant; not upon the marshal, the ministerial officer, whose duty it is made to execute it. If these facts are sufficiently established before the magistrate to authorize the process, the marshal is authorized to arrest and to detain the person, until the hearing has taken place according to the provisions of the statute, and until the truth or falsity of the facts is established by the evidence. The question is one exclusively for the magistrate to determine, and, until that determination, the person arrested is in the custody of the law.

These principles are too common and familiar to require illustration or authority; and, in our judgment, upon any sound construction of the provisions of the act of Congress

on this subject, must govern the case. We have examined these provisions with some care, and the above are the deliberate conclusions at which we have arrived.

There is a remaining question in the case, which it is proper to notice — namely, the charge impeaching the conduct of Mr. Gates, the deputy marshal, whose duty it was made to draw the grand jury from the box of jurors for the county of Erie ; and, also, to summon them for the term of the District Court held at Buffalo when this indictment was found. This charge is founded upon the affidavit, on information and belief, of one of the parties indicted. We have the affidavit of the deputy marshal, of the clerk of the county, and of a third person, who were present at the drawing, and witnessed it, and they show that the charge is utterly unfounded, and most unjust as it respects this officer. The drawing took place in the usual way, and in strict conformity to the law. There is not the slightest ground for the imputation against the fairness and good faith of the deputy in the discharge of his duty, either in the drawing or the summoning of the jury, and it never should have been made.

For the reasons above given, the motion to quash the indictment must be denied.

Miscellaneous Intelligence.

Proceedings of the Circuit Court of the United States for The District of Massachusetts, on the occasion of the Death of Daniel Webster. — The members of the Bar met in the Law Library Monday morning, October 25. They were called to order by the Hon. George Lunt, District Attorney of the United States, and Hon. Charles G. Loring was appointed Chairman, and Francis O. Watts, Esq., Secretary. Hon. Rufus Choate, Sydney Bartlett, Esq., Hon. George S. Hillard, Richard H. Dana, Jr., and George T. Curtis, Esquires, were appointed to report resolutions at a future meeting. Tuesday morning, at the adjourned meeting, Hon. Simon Greenleaf, John P. Putnam, and Tolman Willey, Esquires, were added to the committee. Thursday, October 28th, the Bar again met in the Supreme Court room, and the resolutions given below were reported and adopted, when the meeting adjourned to the Circuit Court — then in session — Curtis and Sprague, Justices, on the bench. The room was crowded to overflowing. The Hon. George Lunt announced to the court the death of Mr. Webster, as follows :

May it please your Honors — I have the sad duty to announce, as Attorney of the United States for this district, the removal of Daniel Webster, the great leader and exemplar of this Bar, by death. The performance of the mournful duty thus devolved upon me, results from my official position,

and is in accordance with the usages of the Bar. But I should do dishonour to my own feelings, did I not at the same time signify that my heart beats in unison with all other hearts, under the pressure of so great a calamity. And while I discharge this office, I only feel how inadequate must be every tribute of respect to the memory of that illustrious citizen, whose public life for so long a period has constituted one of the chief elements of the pride and glory of his country. But feeling only too sensibly that what belongs to me in this public expression of sorrow arises only from the accident of my position, I am equally sensible that it does not become me to assume the place of his eulogist, whose fame is indeed beyond all eulogy.

It is impossible not to be conscious that a glory has departed which blazes rarely in the successive centuries of time. And as in the disruption of private ties, we turn in vain to those who remain for relief, so in the departure of this great personage, singularly unequalled and unapproached by all others of his time, we feel that a vast and "aching void" will long be left unsatisfied in the beating heart of a nation.

But it is a source of satisfaction to me that there are present those members of this Bar who for many years have enjoyed the more intimate communion of this majestic spirit. They have been animated and elevated and inspired by the sublime intellect of him whose record has long been written amongst

> "The few, the immortal names,
> Which were not born to die."

To them I would respectfully leave what better becomes those who have nearer rights and higher capacities for so great a theme.

With the permission of your Honors, I will ask that, at the close of these proceedings, this Circuit Court of the United States do adjourn, and that the ceremonial of this day be entered upon its records.

The Hon. Charles G. Loring then addressed the court:

May it please the Court — I stand before you as the humble organ of this Bar, instructed to present for entry on your records resolutions passed at a recent meeting, expressive of our emotions upon the death of our illustrious leader, whose departure fills not only our, but a nation's heart, with grief.

The subject, while of profoundest interest, is too grand for oratory. The announcement that Daniel Webster is dead fills the souls of all here with recollections, thoughts and emotions, which no other words could excite. The simple statement of the event is the most appropriate eloquence. It is in justice only to ourselves, not to him, that our feelings seek utterance and relief in words.

His name and character, indeed, belong to the whole people of the United States of America, whom he has so long, so faithfully and so gloriously served, and not to this or any other Bar or State. There is not an intelligent citizen of this broad Republic, from the Canadas to the Rio Grande, or from the Atlantic to the Pacific, or who sails beneath its flag in the remotest sea, to whom knowledge of this event will not come as sad tidings of public calamity, — as of a tower of national strength laid low, as of a star stricken from the firmament of his country's glory.

The colossal grandeur of his intellect, the vast number and magnitude of his services as a patriotic statesman, and his rank as one of the most profound reasoners and sublime orators which have appeared in any age or nation; and the influences he has thus exercised, and for ages to come must continue to exert upon the mind, institutions and destinies of the American people, are treasures of national wealth, and themes for other occasions.

But with these are inseparably connected his labors as a jurist, which it becomes us, more particularly, to commemorate on this occasion; and which, although less generally conspicuous, even to his contemporaries, and becoming less so as advancing time and experience consecrate into axioms the great principles which he was primarily and chiefly instrumental in establishing, are of no less magnitude and importance, as having led to those judicial constructions of the constitution which have confirmed it in the confidence and affections of the people as a truly national institution. These services we may, perhaps, be the more able to appreciate as presenting unequalled professional claims to the lasting gratitude of the country, and the admiration and reverence of every student of its judicial history.

To Mr. Webster are we chiefly indebted that the ægis of the national constitution has been spread over the rights of property and franchises held under state charters, protecting them alike from oppressive, corrupt or ill-considered local legislation; to him, for the first enunciation and maintenance of the great theory of the entire unity of the commercial relations of the several states, forbidding monopolies of any nature within the navigable waters of either; and to him, far beyond all others, in frequent political and forensic arguments, for those masterly expositions of the principles involved in the conflict of jurisdictions of the general government and of the individual states, which will henceforth compose, not so much weapons for conflict, as acknowledged truths upon which future questions shall be decided.

It is a common subject of thankfulness to the Divine Providence, which has hitherto so mercifully shaped our nation's destiny, that statesmen were originally vouchsafed capable of framing and administering our national constitution; and it is no less a cause of reverential gratitude that after they were gathered to their fathers, another was sent equally imbued with its spirit, and profound apprehension of its great principles and their far-reaching influences, to apply them as a statesman and jurist in the great emergencies which were soon to arise, to test its adaptation to the vast ends for which it was designed.

And history, in completing the noblest column as yet raised in her temple, that of American constitutional liberty, while inscribing upon its tablet the names of Adams, Jefferson, Madison, Jay and Hamilton, as founders of the glorious fabric, will instinctively add the name of Daniel Webster, as equally entitled to the eternal gratitude of his countrymen, as its expositor and defender. But to us, as members of this Bar, who have encountered or been associated with him in its arduous conflicts, have witnessed his forensic efforts and enjoyed the privileges of social and friendly intercourse with him, and who have with such honest pride exulted in him as our head and leader, this event is of still closer interest. Who of us can ever forget his broad and comprehensive views, his clear and masterly statements of his cases, in themselves convincing arguments, the exquisite precision and no less wonderful language, his profound logic, his varied and extensive learning, his dignity of manner and his matchless eloquence, his whole professional learning? Who of us has failed to exult as we held our breath in his ascent as on eagle's wings to the brightest heavens of eloquence, when conscious of the righteousness of his cause; or has not witnessed how heavy became his flight and drooping his pinions when conscious of a bad one? Mr. Webster could not, and all honor be to his name that he could not, argue a bad cause comparatively well. His mental vision was too penetrating and comprehensive, his logic too uncompromising, his perception of truth too clear, and his love of it too instinctive to fit him as the champion of error.

Well may we exclaim in retrospect of his intercourse and services at this Bar,—

> Heu! quanto minus cum reliquis versari
> Quam Tui meminisse.

But I forbear further allusion to our own bereavement. Standing as we are amid the ruins of a nation's fortress, the shock of whose fall is still vibrating thoughout the land, the heart instinctively turns from the meditation of comparatively private sorrow to the nation's loss, and to gathering up the consolations of remembrance and hope. True, the mighty arm upon which we most confidently rested for defence against foreign political encroachment, and to maintain our dignity among the nations of the earth, is broken; the rock in the political wilderness, which needed to be touched only by the wand of patriotism, to send forth gushing waters of wisdom and peace to allay the fever of the people, is removed out of its place; and the star that has so long guided in the night and tempest of national perplexity and agitation, is gone down forever; but the recorded treasures of his wisdom remain imperishable; the great principles he has established or vindicated for the nation's guidance, now become, and will forever stand as household gods in the hearts of the people. "I still live!" were the last words of the dying patriot, in prophetic vision of the immortality of his name and services; and he will "still live" in influence and grateful remembrance so long as the American Union shall endure and its flag wave over an intelligent and loyal people.

Nor is the last and highest consolation wanting to us. Our friend died in the profession and peace of that faith which the greatest, equally with the humblest, views in the scenes and labors of life, and in passing through the valley of the shadow of death, and yielded up his mighty spirit in filial trust to the God who gave it; who alone knoweth the heart and trieth the reins of man, and to whom alone, in faith and humility, must all judgment of our fellow-men, as well as of ourselves, be finally committed.

The Hon. George S. Hillard read the following Resolutions of the Bar, and asked that they be entered upon the records of the court.

Resolved, That as members of the Bar we look back with pride upon Mr. Webster's professional career, and acknowledge with gratitude the honor which such a life, and such powers, have shed upon the law. His mind was early imbued with the bracing learning of the common law, the principles of which he seized with a strong grasp, which neither time, nor subsequent devotion to pursuits of politics and government, ever relaxed. He was equally familiar with the technical refinements of special pleading, and the recondite learning of real law. Trained by long and constant conflict with some of the ablest lawyers and advocates whom this country has reared, his judgment in the conduct of causes, his familiarity with the rules of evidence, and his presence of mind in the meeting of legal emergencies, were not less conspicuous than the wisdom and eloquence which have made his public career so illustrious. His addresses to juries were marked by simplicity, clearness, dignity and power. His legal arguments were learned, strong, luminous and convincing. His profound and massive constitutional arguments embody the soundest principles of interpretation, and form unrivalled models of logical reasoning. His mind drew from the law no other elements than those of expansion and growth, and in the speeches and writings which have done so much honor to him, and so much honor to the country, we recognise the training and discipline derived from the studies and the contests of the Bar.

Resolved, That as citizens of our common country, we acknowledge, with profound sensibility, the great debt of gratitude and admiration due

to him, as an enlightened and patriotic statesman. As a public man, he was just, brave, and wise — jealous of the honor of his own country, and mindful of the rights of others; far-seeing and sagacious — wise to discern the right, and firm in maintaining it. His political creed was the application of the rules of sound morals to government. He valued constitutional liberty because he understood it, and his powerful voice has penetrated wherever freedom was struggling and humanity oppressed. His views were broad, national, and comprehensive, limited to no party, and bounded by no section of the country. He detected with unrivalled sagacity the springs of national greatness, and expounded them with proportionate clearness and power. In counsels and principles like his, we see the elements of national power, of material prosperity, and of moral influence. Nor should we, in his more eminent and conspicuous merits, overlook the uniform dignity and decorum of his public career, the freedom from personality, and from appeals to low and unworthy motives, which characterize his speeches, and the high tone of thought and discussion which marks them.

Resolved, That we recognise in Mr. Webster's life and words, elements of greatness and power, independent of his career as a lawyer and a statesman. A writer, a thinker and a speaker, his influence has been great while living, and will be not less great when dead. His vigorous and masculine style was no more than the adequate expression of weighty and striking thought. His eloquence was simple, severe, and grand, never stooping to exaggeration or extravagance, never lending itself to base or unworthy ends. His writings are treasures of thought, pure in their morality, of classical beauty, and ennobling in all their tendencies. His private life, not less than his public, illustrated the greatness of his character. In all his social and domestic relations, the varied and noble gifts of his intellect and of his heart shone conspicuously. The generous affections of friends, in which he was so rich, attest the integrity, uprightness and beauty of his daily walk. And when Heaven decreed that he must close the majestic life which he had lived, he added to that life its crowning glory, by acknowledging his humble faith in the doctrines of Christianity, and by dying a Christian's death.

Resolved, That the Bar deeply mourn the loss of one so great as a statesman, so profound as a lawyer, and so noble as a man; that they tender their heartfelt sympathies to the family of the deceased, and request permission to join in the funeral ceremonies.

Resolved, That the President of this meeting be requested to communicate a copy of these Resolutions to the family of the deceased, and to present the same in the Circuit Court of the United States, now in session.

The Hon. Rufus Choate then said, —

May it please your Honors — I have been requested by the Members of the Bar of this Court to add a few words to the Resolutions just read, in which they have embodied, as they were able, their sorrow for the death of their beloved and illustrious member and countryman, Mr. Webster; their estimation of his character, life and genius; their sense of the bereavement, to the country as to his friends, incapable of repair; the pride, the fondness, — the filial and the patriotic pride and fondness with which they cherish, and would consign to history to cherish, — the memory of a great and good man.

And yet I could earnestly have desired to be excused from this duty. He must have known Mr. Webster less, and loved him less than your Honors or than I have known and loved him, who can quite yet — quite yet — before we can comprehend that we have lost him forever — before the first

paleness with which the news of his death overspread our cheeks, has passed away; before we have been down to lay him in the Pilgrim soil he loved so well — till the heavens be no more — he must have known and loved him less than we have done — who can come here quite yet, to recount the series of his services — to display with psychological exactness the traits of his nature and mind; to ponder and speculate on the secrets, on the marvellous secrets and source of that vast power, which we shall see no more in action — nor aught in any degree resembling it — among men. These first moments should be given to grief. It may employ, it may promote a calmer mood, to construct a more elaborate and less unworthy memorial.

For the purposes of this moment and place, indeed, no more is needed. What is there for this Court, or for this Bar, to learn from me, here and now, of him? The year and the day of his birth — that birth-place on the frontier, yet bleak and waste; the well of which his childhood drank — dug by that father, of whom he has said, "That through the fire and blood of seven years of revolutionary war, he shrank from no danger, no toil, no sacrifice, to serve his country, and to raise his children to a condition better than his own;" the elm tree that father planted, fallen now, as father and son have fallen; that training of the giant infancy, on Catechism and Bible, and Watts's version of the Psalms, and the traditions of Plymouth, and Fort William and Mary, and the Revolution, and the age of Washington and Franklin, on the banks of the Merrimack, flowing sometimes in flood and anger, from his secret springs in the crystal hills; the two district schoolmasters, Chase and Tappan; the village library; the dawning of the love and ambition of letters; the few months at Exeter and Boscawen, the life of college, the probationary season of school-teaching, the clerkship in the Fryeburg registry of deeds; his admission to the bar, presided over by judges like Smith, illustrated by practisers such as Mason, where, by the studies, in the contentions of nine years, he laid the foundation of the professional mind; his irresistible attraction to public life, the oration on Commerce, the Rockingham Resolutions, his first term of four years' service in Congress, when by one bound he sprang to his place by the side of the foremost of the rising American statesmen; his removal to this State, and then the double and parallel current in which his life, studies, thoughts, cares, have since flowed, bearing him to the leadership of the bar, by universal acclaim: bearing him to the leadership of public life; last of that surpassing triumvirate, shall we say the greatest, the most widely celebrated and admired; — all these things, to their minutest details, are known and rehearsed familiarly. Happier than the younger Pliny, happier than Cicero, he has found his historian, unsolicited, in his lifetime — and his countrymen have him all by heart!

There is, then, nothing to tell you; nothing to bring to mind. And then, if I may borrow the language of one of his historians and friends, one of those, through whose beautiful pathos the common sorrow uttered itself yesterday in Faneuil Hall — "I dare not come here, and dismiss, in a few summary paragraphs, the character of one who has filled such a space in the history, who holds such a place in the heart of his country. It would be a disrespectful familiarity, to a man of his lofty spirit, his great soul, his rich endowments, his long and honorable life, to endeavor thus to weigh and estimate them;" — a half-hour of words, a handful of earth, for fifty years of great deeds, on high places!

But although the time does not require any thing elaborated and adequate, — forbids it rather, — some broken sentences of veneration and love may be indulged to the sorrow which oppresses us.

There presents itself, on the first, and to any observation of Mr. Web-

ster's life and character, a two-fold eminence; eminence of the very highest rank in a two-fold field of intellectual and public display, the profession of the law, and the profession of statesmanship, of which it would not be easy to recall any parallel in the biography of illustrious men.

Without seeking for parallels, and without asserting that they do not exist, consider that he was by universal designation the leader of the general American Bar; and that he was also by an equally universal designation foremost of her statesmen living at his death; inferior to not one who has lived and acted since the opening of his own public life. Look at these aspects of his greatness separately, — and from opposite sides of the surpassing elevation. Consider that his single career at the Bar may seem to have been enough to employ the largest faculties without repose — for a lifetime — and that if then and thus the "*infinitus forensium rerum labor*," should have conducted him to a mere professional reward — a Bench of Chancery or Law — the crown of the first of advocates — *jurisperitorum eloquentissimus* — to the pure and mere honors of a great magistrate; that that would be as much as is allotted to the ablest in the distribution of fame. Even that half — if I may say so—of his illustrious reputation — how long the labor to win it — how worthy of all that labor! He was bred first in the severest school of the common law, in which its doctrines were expounded by Smith, and its administration shaped and directed by Mason, — and its foundation principles, its historical sources and illustrations, its connection with the parallel series of statutory enactments, its modes of reasoning, and the evidence of its truths, he grasped easily and completely; and I have myself heard him say, that for many years while still at that bar, he tried more causes and argued more questions of fact to the jury, than perhaps any other member of the profession any where. I have heard from others how even then he exemplified the same direct, clear and forcible exhibition of proofs, and the reasonings appropriate to proofs — as well as the same marvellous power of discerning instantly what we call the decisive points of the cause in law and fact — by which he was later more widely celebrated. This was the first epoch in his professional training.

With the commencement of his public life, or with his later removal to this State, began the second epoch of his professional training — conducting him through the gradation of the national tribunals to the study and practice of the more flexible, elegant and scientific jurisprudence of commerce and of chancery — and to the grander and less fettered investigations of international, prize and constitutional law — and giving him to breathe the air of a more famous forum; in a more public presence; with more variety of competition, although he never met abler men, as I have many times heard him say, than some of those who initiated him in the rugged discipline of the courts of N. Hampshire; and thus, at length, by these studies; these labors; this contention; continued without repose, he came, now many years ago, to stand *omnium assensu* at the summit of the American Bar.

It is common, and it is easy, in the case of all in such position, to point out other lawyers, here and there, as possessing some special qualification or attainment more remarkably, perhaps, because more exclusively — to say of one that he has more cases in his recollection, at any given moment; or that he was earlier grounded in equity; or has gathered more black letter or civil law; or knowledge of Spanish or Western titles; and these comparisons were sometimes made with him. But when you sought a counsel of the first-rate for the great cause, who would most surely discern and most powerfully expound the exact law, required by the controversy, in season for use — who could most skilfully encounter the opposing law — under whose power of analysis, persuasion and display, the asserted right would assume the most probable aspect before the intelligence of the Judge

— who, if the inquiry became blended with, or resolved into facts, could most completely develope and most irresistibly expose them — one, "the law's whole thunder born to wield" — when you sought such a counsel, and could have the choice, I think the universal profession would have turned to him. And this would be so in nearly every description of cause — in any department. Some able men wield civil inquiries with a peculiar ability — some criminal. How lucidly and how deeply he unfolded a question of property you all know. But then, with what address, feeling, pathos and prudence he defended — with what dignity and crushing power, *accusatorio spiritu*, he prosecuted the accused of crime, whom he believed to have been guilty, few have seen — but none who have seen can ever forget it.

Some scenes there are — some Alpine eminences rising above the high table-land of such a professional life, to which, in the briefest tribute, we should love to follow him. We recall that day, for an instance, when he first announced, with decisive display, what manner of man he was to the Supreme Court of the Nation. It was in 1818, and it was in the argument of the case of Dartmouth College. Wm. Pinkney was recruiting his great faculties, and replenishing that reservoir of professional and elegant acquisition in Europe. Samuel Dexter, "the honorable man, and the counsellor, and the eloquent orator" was in his grave. The boundless old-school learning of Luther Martin; the silver voice and infinite analytical ingenuity and resource of Jones; the fervid genius of Emmett, pouring itself along *immenso ore;* the ripe and beautiful culture of Wirt and Hopkinson — the steel point unseen, not unfelt, beneath the foliage; Harper, himself, statesman as well as lawyer — these and such as these, were left of that noble bar. That day Mr. Webster opened the cause of Dartmouth College to a tribunal unsurpassed on earth in all that gives illustration to a bench of law, not one of whom any longer survives.

One would love to linger on the scene — when, after a masterly argument of the law, carrying, as we may now know, conviction to the general mind of the court, and vindicating and settling for his lifetime his place in that forum, he paused to enter, with an altered feeling, tone and manner, with these words on his peroration — "I have conducted my alma mater to this presence, that if she must fall, she may fall in her robes, and with dignity," and then broke forth in that strain of sublime and pathetic eloquence, of which we know not much more than that, in its progress, Marshall, the intellectual — the self-controlled — the unemotional, announced, visibly, the presence of the unaccustomed enchantment.

Other forensic triumphs crowd on us — in other competition — with other issues. But I must commit them to the historian of constitutional jurisprudence.

And now, if this transcendent professional reputation were all of Mr. Webster, it might be practicable, though not easy, to find its parallel elsewhere, in our own, or in European or classical biography.

But when you consider that side by side with this, there was growing up that other reputation — that of the first American statesman, — that for thirty-three years, and those embracing his most herculean works at the bar, he was engaged as a member of either House, or in the highest of the executive departments, in the conduct of the largest national affairs — in the treatment of the largest national questions — in debate with the highest abilities of American public life — conducting diplomatic intercourse in delicate relations, with all manner of foreign powers — investigating whole classes of truths, totally unlike the truths of the law, and resting on principles totally distinct, — and that here, too, he was wise, safe, controlling, trusted, the foremost man; that Europe had come to see in his life a guar-

antee for justice, for peace, for the best hopes of civilization; and America to feel surer of her glory and her safety, as his great arm enfolded her — you see how rare, how solitary almost was the actual greatness! Who any where has won, as he had, the double fame, and worn the double wreath of Murray and Chatham, of Dunning and Fox, of Erskine and Pitt, of William Pinkney and Rufus King, in one blended and transcendent superiority?

I cannot attempt to grasp and sum up the aggregate of the service of his public life at such a moment as this — and it is needless. That life comprised a term of more than thirty-three years. It produced a body of performance, of which I may say generally, it was all which the first abilities of the country and time, employed with unexampled toil, stimulated by the noblest patriotism; in the highest places of the state — in the fear of God — in the presence of nations — could possibly compass.

He came into Congress after the war of 1812 had begun, and though probably deeming it unnecessary, according to the highest standards of public necessity, in his private character — and objecting in his public character to some of the details of the policy by which it was prosecuted, and standing by party ties in general opposition to the administration — he never breathed a sentiment calculated to depress the tone of the public mind; to aid or comfort the enemy; to check or chill the stirrings of that new, passionate, unquenchable spirit of nationality, which then was revealed, or kindled to burn till we go down to the tombs of states.

With the peace of 1815 his more cherished public labors began; and thenceforward has he devoted himself — the ardor of his civil youth — the energies of his maturest manhood — the autumnal wisdom of the ripened year — to the offices of legislation and diplomacy; of preserving the peace — keeping the honor — establishing the boundaries, and vindicating the neutral rights of his country — restoring a sound currency, and laying its foundations sure and deep — in upholding public credit — in promoting foreign commerce and domestic industry — in developing our uncounted material resources — giving the lake and the river to trade — and vindicating and interpreting the constitution and the law. On all these subjects, on all measures practically in any degree affecting them, he has inscribed his opinions and left the traces of his hand. Every where the philosophical and patriot statesman and thinker will find that he has been before him, — lighting the way — sounding the abyss. His weighty language, his sagacious warnings, his great maxims of empire, will be raised to view, and live to be deciphered when the final catastrophe shall lift the granite foundation in fragments from its bed.

In this connection I cannot but remark to how extraordinary an extent had Mr. Webster, by his acts, words, thoughts, or the events of his life, associated himself forever in the memory of all of us with every historical incident, or at least with every historical epoch; with every policy, with every glory, with every great name and fundamental institution, and grand or beautiful image, which are peculiarly and properly American. Look backwards to the planting of Plymouth and Jamestown, to the various scenes of colonial life in peace and war; to the opening, and march, and close of the revolutionary drama; to the age of the constitution; to Washington, and Franklin, and Adams, and Jefferson; to the whole train of causes from the reformation downwards which prepared us to be republicans, — to that other train of causes which led us to be unionists. Look round on field, work-shop and deck, and hear the music of labor rewarded, fed and protected; look on the bright sisterhood of the states, each singing as a seraph in her motion, yet blending in a common harmony, and there is nothing which does not bring him by some tie to the memory of America. We seem to see his form and hear his deep, grave speech every where. By

some felicity of his personal life; by some wise, deep or beautiful word, spoken or written; by some service of his own, or some commemoration of the services of others, it has come to pass that "our granite hills, our inland seas, and prairies, and fresh, unbounded, magnificent wilderness;" our encircling ocean; the rock of the Pilgrims; our new born sister of the Pacific; our popular assemblies; our free schools; all our cherished doctrines of education, and of the influence of religion, and material policy, and the law, and the constitution, give us back his name. What American landscape will you look on; what subject of American interest will you study; what source of hope or of anxiety, as an American, will you acknowledge, that it does not recall him?

I shall not venture in this rapid and general recollection of Mr. Webster, to attempt to analyze that intellectual power which all admit to have been so extraordinary, or to compare or contrast it with the mental greatness of others — in variety or degree — of the living or the dead; or even to appreciate exactly, and in reference to canons of art, his single attribute of eloquence. Consider, however, the remarkable phenomenon of excellence in three unkindred, one might have thought, incompatible forms of public speech — that of the forum, with its double audience of bench and jury, of the halls of legislation, and of the most thronged and tumultuous assemblies of the people. Consider further that this multiform eloquence, exactly as his words fell, became at once so much accession to permanent literature, in the strictest sense — solid, attractive and rich — and ask how often in the history of public life such a thing has been exemplified. Recall what pervaded all these forms of display, and every effort in every form, that union of naked intellect in its largest measure, which penetrates to the exact truth of the matter in hand, by intuition or by inference, and discerns every thing which may make it intelligible, probable or credible to another, with an emotional and moral nature profound, passionate and ready to kindle, and with an imagination enough to supply a hundred-fold more of illustration and aggrandizement than his taste suffered him to accept; that union of greatness of soul with depth of heart, which made his speaking almost more an exhibition of character than of mere genius; the style not merely pure, clear, Saxon, but so constructed, so numerous as far as becomes prose, so forcible, so abounding in unlabored felicities, the words so choice, the epithet so pictured, the matter absolute truth, or the most exact and specious resemblance the human wit can devise, the treatment of the subject, if you have regard to the kind of truth he had to handle, political, ethical, legal, as deep, as complete as Paley's, or Locke's, or Butler's, or Alexander Hamilton's, of their subjects, yet that depth and that completeness of sense, made transparent as through crystal waters, all embodied in harmonious or well-composed periods; raised on winged language, vivified, fused and poured along in a tide of emotion, fervid and incapable to be withstood — recall the form, the eye, the brow, the tone of voice, the presence of the intellectual king of men — recall him thus, and in the language of Mr. Justice Story, commemorating Samuel Dexter, we may well "rejoice that we have lived in the same age, that we have listened to his eloquence, and been instructed by his wisdom."

I cannot leave the subject of his eloquence without returning to a thought I have advanced already. All that he has left — or the larger portion of all — is the record of spoken words. His works, as already collected, extend to many volumes — a library of reason and eloquence, as Gibbon has said of Cicero's — but they are volumes of speeches only, or mainly; and yet who does not rank him as a great American author — an author as truly expounding, and as characteristically exemplifying in a pure, genuine, and harmonious English style, the mind, thought, point of view of

objects, and essential nationality of his country, as any other of our authors, professionally so denominated? Against the maxim of Mr. Fox, his speeches read well, and yet were good speeches — great speeches in the delivery. For so grave were they; so thoughtful and true; so much the eloquence of reason at last; so strikingly always they contrived to link the immediate topic with other and broader principles, ascending easily to widest generalizations; so happy was the reconciliation of the qualities which engage the attention of hearers, yet reward the perusal of students, so critically did they keep the right side of the line which parts eloquence from rhetoric, and so far do they rise above the penury of mere debate, that the general reason of the country has enshrined them at once, and forever, among our classics.

It is a common belief that Mr. Webster was a various reader; and I think it is true even to a greater degree than has been believed. In his profession of politics, nothing I think, worthy of attention, had escaped him,—nothing of the "ancient or modern prudence," nothing which Greek or Roman, or European speculation in that walk had explored, or Greek or Roman, or European or universal history, or public biography exemplified. I shall not soon forget with what admiration he spake, at an interview to which he admitted me while in the Law School at Cambridge, of the politics and ethics of Aristotle, and of the mighty mind which, as he said, seemed to have "thought through" so many of the great problems which form the discipline of social man. American history, and American political literature he had by heart, — the long series of influences which trained us for representative and free government; that other series of influences, which moulded us into a united government; the Colonial era; the age of controversy before the Revolution; every scene, and every person in that great tragic action; every question which has successively engaged our politics, and every name which has figured in them, — the whole stream of our time was open, clear, and present ever to his eye.

Beyond his profession of politics, so to call it, he had been a diligent and choice reader, as his extraordinary style in part reveals, and I think the love of reading would have gone with him to a later and riper age, if to such an age it had been the will of God to reserve him. This is no place or time to appreciate this branch of his acquisitions; but there is an interest inexpressible in knowing who were any of the chosen from among the great dead in the library of such a man. Others may correct me, but I should say of that interior and narrower circle, were Cicero, Virgil, Shakspeare, whom he knew familiarly as the Constitution — Bacon, Milton, Burke, Johnson — to whom, I hope it is not pedantic nor fanciful to say, I often thought his nature presented some resemblance; the same "abundance of the general propositions required for explaining a difficulty and refuting a sophism, copiously and promptly occurring to him;" the same kindness of heart, and wealth of sensibility; under a manner, of course, more courteous and gracious, yet more sovereign; the same sufficient, yet not predominant imagination, stooping ever to truth, and giving affluence, vivacity and attraction, to a powerful, correct, and weighty style of prose.

I cannot leave this life and character, without selecting and dwelling a moment on one or two of his traits, or virtues, or felicities, a little longer. There is a collective impression made by the whole of an eminent person's life, beyond and other than, and apart from that which the mere general biographer would afford the means of explaining. There is an influence of a great man derived from things indescribable almost, or incapable of enumeration, or singly insufficient to account for it; but through which his spirit transpires, and his individuality goes forth on the contemporary generation. And thus, I should say, one grand tendency of his life and

character was to elevate the whole tone of the public mind. He did this, indeed, not merely by example. He did it by dealing as he thought, truly, and in manly fashion, with that public mind. He evinced his love of the people, not so much by honeyed phrases, as by good counsels and useful service, *vera pro gratis*. He showed how he appreciated them, by submitting sound arguments to their understandings, and right motives to their free-will. He came before them less with flattery than with instruction; less with a vocabulary larded with the words, humanity and philanthropy, and progress and brotherhood, than with a scheme of politics, an educational, social and governmental system, which would have made them prosperous, happy, and great.

What the greatest of the Greek historians said of Pericles, we all feel might be said of him, — "He did not so much follow as lead the people, because he framed not his words to please them, like one who is gaining power by unworthy means, but was able and dared on the strength of his high character, even to brave their anger by contradicting their will."

I should indicate it as another influence of his life, acts and opinions, that it was in an extraordinary degree uniformly and liberally conservative. He saw with vision as of a prophet, that if our system of united government can be maintained till a nationality shall be generated of due intensity and due comprehension, a glory indeed millennial, a progress without end, a triumph of humanity hitherto unseen, were ours; and therefore he addressed himself to maintain that united government.

Standing on the rock of Plymouth, he bid distant generations hail, and saw them rising, "demanding life, impatient for the skies," from what were "fresh, unbounded, magnificent wildernesses," — from the shore of the great tranquil sea, — not yet become ours. But observe to what he welcomes them, by what he would bless them. "It is to good government;" it is to "treasures of science, and delights of learning;" it is to the "sweets of domestic life, the immeasurable good of rational existence, the immortal hopes of Christianity, the light of everlasting truth."

It will be happy, if the wisdom and temper of his administration of our foreign affairs, shall preside in the time which is at hand. Sobered, instructed by the examples and warnings of all the past, he yet gathered from the study and comparison of all the eras, that there is a silent progress of the race, without pause, without haste, without return, to which the counsellings of history are to be accommodated by a wise philosophy. More than, or as much as that of any of our public characters, his statesmanship was one which recognised a Europe, an old world, but yet grasped the capital idea of the American position, and deduced from it the whole fashion and color of its policy; which discerned that we are to play a high part in human affairs, but discerned also what part it is, peculiar, distant, distinct, and grand as our hemisphere; an influence, not a contact, — the stage, the drama, the catastrophe, all but the audience all our own; and if ever he felt himself at a loss, he consulted reverently the genius of Washington.

In bringing these memories to a conclusion, for I omit many things because I dare not trust myself to speak of them, I shall not be misunderstood, or give offence, if I hope that one other trait in his public character, one doctrine, rather, of his political creed, may be remembered and be appreciated. It is one of the two fundamental precepts in which Plato, as expounded by the great master of Latin eloquence, and reason and morals, comprehends the duty of those who share in the conduct of the state, — "*Ut, quæcunque agunt, TOTUM corpus reipublicæ curent; nedum partem aliquam tuentur, reliquas deserant*," that they comprise in their care the whole body of the republic, nor keep one part and desert another. He

gives the reason, one reason, of the precept, — "*Qui autem parti civium consulunt, partem negligunt, rem perniciosissimam in civitatem inducunt, seditionem atque discordiam.*" The patriotism which embraces less than the whole, induces sedition and discord, the last evil of the state.

How profoundly he had comprehended this truth; with what persistency, what what passion, from the first hour he became a public man, to the last beat of the great heart, he cherished it; how little he accounted the good, the praise, the blame, of this locality or that, in comparison of the larger good, and the general and thoughtful approval of his own, and our, whole America, — she this day feels and announces. Wheresoever a drop of her blood flows in the veins of man, this trait is felt and appreciated. The hunter beyond Superior, the fisherman on the deck of the nigh night-foundered skiff, the sailor on the uttermost sea, will feel, as he hears these tidings, that the protection of a sleepless, all-embracing parental care, is withdrawn from him for a space, and that his pathway henceforward is more solitary and less safe than before.

But I cannot pursue these thoughts. Among the eulogists who have just uttered the eloquent sorrow of England at the death of the great Duke, one has employed an image, and an idea, which I venture to modify and appropriate.

"The Northmen's image of death, is finer than that of other climes; no skeleton, but a gigantic figure that envelopes men within the massive folds of its dark garment. Webster seems so enshrouded from us, as the last of the mighty Three, themselves following a mighty series; the greatest closing the procession. The robe draws round him, and the era is past."

Yet how much there is which that all-ample fold shall not hide; the recorded wisdom; the great example; the assured immortality.

They speak of monuments!

> "Nothing can cover his high fame but heaven,
> No pyramids set off his memories
> But the eternal substance of his greatness;
> To which I leave him."

George T. Curtis, Esq., followed Mr. Choate:

May it please your Honors, — In the general sorrow which pervades all hearts, perhaps the consoling reflections which I am able to bring from the last earthly presence of the great departed will find appropriate expression here.

We have all witnessed his life. We have known him in the Senate, in the forum, in the popular assembly, in the social circle; in all the works and the duties of the manifold relations which he filled with his own peculiar greatness.

It was my privilege, also, to have witnessed his death, so grand, so tranquil, that we who stood and watched the moments that were slowly bearing away from us his great spirit, could scarcely feel the weight of the affliction which was descending upon our souls, and when in the silence of that chamber, which the breath of an infant would have broken, the dread announcement came at last, we seemed to have watched, and served, and prayed, not at a dissolution of this "mortal coil," but at a translation of some great servant of God into the realms of bliss.

It is known to all that the death of Mr. Webster was, in all respects, worthy of his life. It was more. It was the consummation of his character, the crowning glory of his whole mortal existence. It was his singular happiness to have been able to approach the dark portals of the tomb with a perfectly distinct and clear perception, that they had been opened to re-

ceive him; and yet with his mind under its own entire control, as completely as it had ever been, since it came from his Maker's hands.

The manner in which he kept himself in a perfectly elevated, noble and religious state of mind, and yet never lost sight of the smallest duties, or failed in the expression of a kind thought to those about him, seemed to me to mark the greatness of his nature, more than all the other proofs of intellectual supremacy which his life has exhibited. His vast intellect never changed its relations to any subject, any thing or any person; never lost the sense of what was due to his own character and his own position among men; never withdrew itself from a single occupation: never exchanged the activity of life for the imbecilities of disease; never yielded to complaint; never surrendered itself to aught but the final grasp of death, which shut it from earthly manifestation.

In all this extraordinary exhibition of the power and balance of his mind, there was nothing of Roman stoicism. A more than Roman dignity enveloped him to the end. His warm affections remained unchanged, overflowing to all around him; and he could not so have died if he had not been sustained by a religious faith, such as a mind like his must possess if it lives at all. There was nothing in his faith of a technical character. No expression escaped him which would mark him as of this or that theology, or of any church, save the universal church of Christ. "What," said he, to those who gathered about him, "what would be the condition of any of us without the hope of immortality?"

What is there to rest that hope upon but the Gospel? And it was while resting his hope upon that foundation that he could look back over his long life and say — "My general wish on earth has been to do my Maker's will. I thank him. I thank him for the means of doing some little good for these beloved objects, for the blessings that surround me, for my nature and associations. I thank him that I am to die under so many circumstances of love and affection." It was his good fortune, also, in which, considering how far from that spot his public duties considerably drew him, we may see almost a special Providence, that he died in the home of his affections, and away from all the scenes and exactions of political strife.

There his last days, and even hours, were given peacefully to the great concerns of his country, from which his attention was never withdrawn, until the messenger from another world was actually at the door. There he found solace to his declining strength, amid the scenes of nature which he so passionately loved, and in which he had been so long accustomed to renew his power.

There were the graves of the loved and lost who had gone before him; there was the beautiful home which his fame has made historical, and which he fondly trusted would remain to his blood and name through the generations that still gather around its hearth. There his great heart could expand itself to the love of those nearest and dearest to him on earth, and there he could receive as he did receive from those not present as well as from those who were about him, a ministry of veneration and love which will be to them a precious recollection forever.

Mr. Justice Sprague replied:

The event we deplore is solemn, is appalling, not only as a calamity and for the void which it creates, but still more as bringing with it an overwhelming sense of the nothingness of human power. Others may have excelled Mr. Webster in some intellectual endowment, but in the combination of the statesman, the orator, the diplomatist, the jurist and the advocate, the present age has produced no equal, and no age a superior.

It was my lot to be associated with him in both branches of the National Legislature, and as a member of the same political party, of the same pro-

fession, and from the same section of the country. It is now nearly twenty-seven years since I entered the House of Representatives, of which he was then a member. The pre-eminence asserted for him by his friends, was not then conceded by his opponents. But it was soon observable that whenever a debate arose in which Mr. Webster took an earnest part, even those who were most strenuous in denying his general superiority, were constrained to admit that upon that occasion he had excelled all others. These occasions at length became so multiplied, with so many opponents, and upon such a variety of topics, that in spite of sectional jealousy, of party prejudice and intolerance, and of personal partialities and local pride, the admission of his superiority was forced upon unwilling minds, and from reluctant lips, and he stood confessed by all unequalled in intellectual power. In the most violent times, under the most exasperating attacks, personal and political, he never transcended the limits of good taste or parliamentary decorum — never violated the courtesy and dignity of senatorial debate.

Should any be disposed to say of him as was said of Burke —

> "Born for the universe, he narrowed his mind,
> And to party gave up what was meant for mankind,"

it should be answered also, that what he gave to party he gave to mankind; for he established principles and elucidated truths of universal application and eternal duration.

No man can read his speeches without clearer views upon great political problems, without a more profound comprehension of the true foundation upon which civil society should be erected, and the just rules by which its affairs should be conducted.

No candid mind can rise from the perusal of his works without a more just and elevated appreciation of our own Constitution and Government, a warmer and more exalted patriotism, without being a truer and firmer friend of real republicanism, of justice, of law, of order, of universal regulated liberty.

The present occasion does not permit me to verify these general remarks by specific and detailed references, nor has the time arrived when his later efforts can be dispassionately considered.

But there is one speech made, so long since as to be now matter of history, and involving no topic of personal excitement, of which I have been especially requested to speak, because it is the most celebrated, and of the then Senators from New England, I am, with one exception, the only survivor; and it is proper to speak of it here and now, because a great vital question of constitutional law was by that speech settled as completely and irrevocably as it could have been by the greatest minds in the highest judicial tribunals.

Mr. Foot's resolutions involved merely the question of limiting or extending the survey of the public lands. Upon this, Mr. Benton and Mr. Hayne addressed the Senate, condemning the policy of the Eastern States, as illiberal towards the West. Mr. Webster replied in vindication of New England and the policy of the government. It was then that Gen. Hayne made the assault which that speech repelled.

It has been asked if it be possible that that reply was made without previous preparation. There could have been no special preparation before the speech began to which it was an answer. When Gen. Hayne closed, Mr. Webster followed, with the interval only of the usual adjournment of one night.

His reply was made to repel an attack, sudden, unexpected, and almost unexampled, an attack upon Mr. Webster personally, upon Massachusetts and New England, and upon the Constitution.

There can be little doubt that this attack was the result of premeditation,

concert, and arrangement. His assailant selected his own time, and that too, peculiarly inconvenient to Mr. Webster, for at that moment the Supreme Court were proceeding in the hearing of a cause of great importance, in which he was leading counsel. For this reason, he requested, through a friend, a postponement of the debate. Gen. Hayne objected, and the request was refused. The assailant, too, selected his own ground, and made his choice of topics, without reference to the resolution before the Senate, or the legitimate subject of debate. The time, the matter, and the manner, indicate that the attack was made with a design to crush a formidable political opponent. To this end, personal history, the annals of New England and of the federal party were ransacked for materials. It was attempted to make him responsible, not only for what was his own, but for the opinions and conduct of others. All the errors and delinquencies, real or supposed, of Massachusetts and the Eastern states, and of the federal party, during the war of 1812, and throughout their history, were to be accumulated on him. It was supposed that, as a representative, he would be driven to attempt to defend what was indefensible, and to uphold what could not be sustained, and as a federalist, to oppose the popular resolutions of '98.

Gen. Hayne heralded his speech with a declararion of war, with taunts and threats, vaunting anticipated triumph, as if to paralyze by intimidation; saying that he had something rankling in his breast, and that he would carry the war into Africa, until he had obtained indemnity for the past, and security for the future.

Mr. Webster evidently felt the magnitude of the occasion, and a consciousness that he was more than equal to it. On no other occasion, although I have heard him hundreds of times, have I seen him so thoroughly aroused. Yet when he commenced, and throughout the whole, he was perfectly self-possessed and self-controlled. Never was his bearing more lofty, his person more majestic, his manner more appropriate and impressive.

At first a few of his opponents made some show of indifference. But the power of the orator soon swept away all affectation, and a solemn, deep, absorbing interest was manifested by all, and continued even through his profound discussion of constitutional law.

When he closed, the impression upon all was too deep for utterance, and, to this day, no one who was present has spoken of that speech but as a matchless achievement and a complete triumph. When he sat down, Gen. Hayne arose, and endeavored to restate and reinforce his argument. This instantly called forth from Mr. Webster that final condensed reply which has the force of a moral demonstration.

The value of that speech cannot be measured, without a just appreciation of our Constitution, and of republican government. Nullification had become formidable. It had been practically adopted in high places, and was sustained by several states, and some of the ablest minds of the South, and was daily gaining strength, as the offspring of the resolutions of '98. By this single effort that deadly heresy was prostrated and crushed forever.

No speech, ancient or modern, has within the same time convinced so many minds, and produced so great and salutary results. It was not addressed merely to the enlightened and reflecting audience around him, but to this great reading nation, and to the civilized world. If the doctrines of Gen. Hayne had prevailed, this Union would have been shattered into fragments; but Mr. Webster and his doctrines have triumphed, and our Union remains, in all its magnificence and beneficence.

When Mr. Webster first entered the State Department, our foreign affairs, particularly with Great Britain, were complicated and critical in the extreme. Adverse military forces had been gathered upon our north-

eastern boundary. In relation to the affair of the Caroline, an unsound doctrine of international law had been put forth on our part, which, if it had been carried out by the threatened punishment of the soldier McLeod, would immediately have brought a hostile fleet upon our coast. The matter of the Creole, too, was a further disturbing cause. Mr. Webster extricated the government from the false position in which it had been placed by his predecessor, by frankly conceding what we could not justly maintain, and planting himself only upon the right.

His state papers, during the administration of Harrison and Tyler, are unsurpassed in power, truth and propriety. His diplomacy was consummate. It attained complete success, and entitled him to the gratitude of his country and the world. If his principles and practice should be followed by all nations, war would cease, and the reign of peace be universal.

Men distinguished in political life have often attempted in vain to command success at the bar, while great lawyers have signally failed in a parliamentary career. Distinct powers are required for each. For the one, the power of resolving a question into its elements; and for the other, the power of combination, of dealing with masses, and of holding great subjects in a comprehensive grasp. Mr. Webster possessed both, pre-eminently.

As a lawyer, he for nearly thirty years stood at the head of the bar of the United States, without a rival; while, at the same time, he maintained his pre-eminence as a statesman and an orator, in the halls of Congress, or at the head of a Cabinet. In consultation, no man was more weighty; in trials at the bar, no man was his equal. He possessed every requisite for success in the highest degree. Eloquent, sagacious, fearless, circumspect, ready, learned and profound. No other lawyer has so ably expounded the Constitution, and no one has done so much to maintain it upon its true foundation, and in its just proportions. Superior as he must have felt himself to be, to those whom he generally addressed, that superiority was never asserted in his manner towards the bench, which was uniformly respectful and deferential. He wished the law to be revered, and he knew that reverence for it could not be maintained without respect for the tribunals by which it is administered. Faithful to his clients, he was also true to the court, and never, for temporary success, exerted his great powers to subvert fundamental principles, or confound the rules of right. He never used his gigantic strength to remove the landmarks of the law. He dealt with facts as an advocate, but with the law as a jurist. It was with him a science, upon which depended public and private right, social order, the peace, the existence of civilized society. I leave to the learned Justice of the Supreme Court, who has been so recently and intimately associated with him at the bar, to present a more complete delineation of his forensic character.

Extraordinary as were the natural gifts of the great departed, he did not trust to them alone. He was laborious, but not with incessant toil. He gave himself frequent intervals of relaxation and repose; but when his mind was brought into earnest exercise, it worked with an intensity and effect that could not be exceeded. One part of his intellectual training particularly recommends itself to the young men of his own profession. When any question was presented to his mind, he was not content to examine it only to see what could be said on his own side, or to maintain a thesis, but he investigated the subject on all sides, sounded its depths, explored its foundations, and having found the truth, laid it up as a treasure to be kept forever. It was thus that he amassed amazing intellectual wealth, upon which he could draw at any time as an exhaustless mine. He had a profound respect and reverence for the Christian religion and

its ordinances. Whenever he spoke of them it was in deep tones of solemnity and awe. No one who knew him would presume to speak of them lightly or thoughtlessly in his presence.

I had hoped that when the time should have arrived for his withdrawal from the active scenes of political life, he would, in his rural retreat, have devoted his last years to the investigation and contemplation of the momentous subject of revelation and a future life, and that he would have given to the world the fruits of the inquiries and reflections of his great mind. Such a work would have been of transcendent value, and a graceful close, and the crowning glory of the labors of his life. But Infinite Wisdom and Infinite Goodness have ordered it otherwise, and we have only to bow in humble submission to the dispensation.

Mr. Justice Curtis said: —

I receive with deep sensibility the resolutions of the Bar, and the remarks of yourself, Mr. Attorney, and of the other gentlemen who have addressed us. The death of this illustrious statesman and jurist has produced a profound impression every where in the country to whose service he devoted his life, and will be felt as an event not unimportant in the civilized world.

Among the gentlemen of this Bar, of which he was a member, with very many of whom he held relations of private friendship, and for whom, as a body, he was ever ready to manifest a fraternal regard, and in this court, which, for more than thirty years, he has enlightened and assisted by his labors, a deep feeling of private grief mingles itself with our sense of the public loss. How great this loss is cannot be described, for it cannot now be even known. The darkness of the future covers the dangers which the Providence of God may permit our country to encounter, and hides from view our needs for the patriotism and surpassing mental power of Mr. Webster. In a government depending for its existence on opinion, the withdrawal of a mind which exercised so great an influence for the preservation and stability of our country, not only in the public councils, but among the people themselves, is a loss indeed.

We submit ourselves to it as inevitable, as having come at the time appointed by the will of Him in whose hand is the destiny of nations, and of men, and with gratitude that so much has been accomplished by him, and so much left for the instruction of this and future times. Of his services and works as a statesman, I can say nothing after what others have said.

But receiving these communications from his brethren of the Bar, I am strongly reminded of the importance to them of the memory and fame of this great lawyer. The illustrious names and great deeds which centuries have gathered are the richest treasures of a nation. The master-pieces of literature and art dignify the pursuits in which they were produced.

We may claim Daniel Webster as an American lawyer. Born during the war of the revolution, in a family which took an honorable part in that great struggle, he was imbued from his infancy with American ideas and principles. He was reared in the simple habits of a New England home. He was forced early into the rough and invigorating contact with nature among the mountains where he had his birthplace. He was trained in the college of his native state. He studied our common law; for although it was painfully wrought out from age to age in another land, yet it was by our ancestors, and I thank God that by as good a title as can be shown under its rules, it is our healthy and manly intellectual, as well as political, inheritance. He knew it as it is in Littleton, this his great commentator, and in Plowden and Saunders, as well as in its more modern sources. His mind was imbued with its logic, and its peculiar style was as familiar to him as that of Taylor or Milton. Its fundamental principles had become a part of the structure of his mind, and under these new skies he maintained

and advanced those great principles of personal liberty under the law and by the law, and the absolute security of private property, which constitute the vital power of the common law. But it must not be forgotten, for the honor of American jurisprudence, and for his honor, that he entered a field such as has existed nowhere else in any age.

It was and is one of the excellencies of the Constitution of the United States that it did not attempt too much, that it is neither a treatise nor a code, but a simple enumeration of the great powers and principles necessary to constitute the government of our country. When this government was put into operation in the same territory and over the same people, having distinct state governments of their own, questions of the last importance to the tranquillity and peace of the country, and to the efficiency and success of the new government, necessarily arose. Few men, whose attention has not been particularly directed to this subject, are aware of the number, the importance, or the difficulty of these questions. A country, already vast in extent, and whose resources, in a rapid course of development, were incalculable; whose people, after great suffering, had, by their own acts, become a nation, had created a court of justice, and delegated to it the power, and imposed upon it, under the most solemn sanctions, the duty of declaring void all legislative acts not in conformity with the Constitution, and of restraining within their appropriate limits of power the state sovereignties under which the people lived.

Questions which elsewhere could have been settled only by mere force, or by diplomatic negotiations, which force influences, were here to be brought to an arbitrament, according to the staid, settled and regular course of judicial procedure.

Into these contests Mr. Webster entered, and for them he was fitted, I think, as no other man has been. He brought to these great debates extensive and accurate historical learning, especially concerning the Constitution itself; a clearness of conception, comprehensiveness of grasp and logical power never surpassed; and to all these was added a command of the English tongue, which, for demonstrative oratory, has, I think, not been equalled.

We may all conceive, what many yet know, that he was able to render and did render to his country, and to the cause of justice and peace, the most eminent service, in this unobtrusive but important scene of action. And we shall make but poor use of his great example if we do not borrow from it higher conceptions and broader views of the capacities and duties of his and our profession. Of even the most prominent causes of great and permanent public importance in which Mr. Webster was engaged, there is not time here to speak, but it may be said generally, without doing any injustice to the great magistrates by whom they were determined, what indeed they were ever ready to acknowledge, that they derived most important assistance from the labors of Mr. Webster.

It is the general destiny of lawyers to leave behind them but few traces, and no monuments, of their intellectual labor. Eloquence and learning, and devotion to duty, and strenuous effort, and high courage, serve their uses of the day, and doubtless find their regard in the breast of their possessor, but with him often dies, even their memory. How little do we know of the forensic arguments of Ames, or Dexter, or Otis. Vague impressions of their power still linger on the fleeting recollections of a few living men, to depart, when they go home, and leave no trace behind.

To a very considerable extent Mr. Webster will probably not partake of this ordinary lot of his brethren. Many of his forensic arguments have been made in causes of such great and permanent importance, they are so admirable in themselves, and in general have been so well preserved, that

they may be expected to be recurred to and studied while the Constitution shall endure.

What estimate posterity may form of the importance to them of this part of his labors, it would be presumptuous in us to attempt to decide. But for ourselves we can declare, that he who has strengthened the foundations of the Constitution, and shielded it from hostile attack, and made apparent to the affections of the people, the strength and beauty of its proportions and the peace and safety which are to be found only within its walls, has rendered to us a service not lightly to be esteemed or soon forgotten.

That in this I do but feebly express what this nation now feels, no man can doubt. To what has been so eloquently said at the Bar concerning his life and his death, it cannot be necessary that I should express my assent. But I desire to say, what I strongly feel, and what it must gratify every man who loves his country to feel, that the death of Mr. Webster has given us a new and affecting proof that we are indeed one people, united by a common attachment to our country and to its great institutions and principles, and to the men who represent and uphold them; that underneath the strife of parties and the more miserable contests of sections and factions, deep in the American heart is a love of the whole country, and therefore it is that from that heart has come the utterances of grief, which arise every where over this broad land; grief for the loss of the man whose heart was large enough, and whose mind was comprehensive enough to include this Union, with all its interests and dependencies, and opinions, and obligations, and rights. And the great principles which he had so powerfully taught in his life, receive from his death a new sanction by his countrymen.

Proceedings in the Supreme Judicial Court of Massachusetts. — This Court was holding the Law Term at Taunton, in Bristol county. There were present Chief Justice Shaw, and Justices Dewey, Metcalf, Bigelow, and Cushing.

A meeting of the Bar was held October 26; Hon. Charles J. Holmes, of Fall River, was chosen Chairman, and Jacob H. Loud, of Plymouth, was appointed Secretary. A Committee of seven was appointed by the Chair, to take such order, and report such resolutions, as would express the sentiments of the Bar on the occasion of the demise of the late Hon. Daniel Webster; and Messrs. Coffin of New Bedford, Whitman of Abington, G. Marston of Barnstable, Colby of New Bedford, Farnsworth of Pawtucket, Eliot of New Bedford, and Miller of Wareham, were appointed said Committee.

The Committee presented the following Resolutions, which were unanimously adopted.

The members of the Bar of the Old Colony, composed of the counties of Bristol, Plymouth, Barnstable and Dukes County, having learned with the most profound sorrow the decease of the Hon. Daniel Webster, avail themselves of this earliest opportunity, at their Annual Meeting at the Law Term of the Supreme Judicial Court, now held at Taunton, to express the sentiments which they entertain, in common with the whole country, at the irreparable loss which they and that country have sustained. Therefore,

Resolved, That the services of Daniel Webster to his country, demand from the members of this Bar an expression of their deep sorrow at his decease, and of their admiration for the unrivalled greatness of his character.

Resolved, That this Bar desire to withdraw for a season from their ordinary pursuits, to meditate upon the loss of the most eminent of their number and to mingle their sorrows with those of a nation that now mourns his departure.

Resolved, That we deeply sympathize with the family of our deceased Brother, and that a copy of these Resolutions, as an expression of that sympathy, be transmitted to them.

Resolved, That the Attorney-General of the Commonwealth be requested to present these Resolutions to the Supreme Judicial Court now in session, and ask that they may be entered on their records.

Upon presenting the foregoing Resolutions, Attorney-General Clifford addressed the Court.

May it please your Honors — At the request of my Brethren of the Bar of the Old Colony, and as their organ, I rise to ask your Honors to suspend for a while our customary labors, in recognition of an event, which requires from us to you, no formal announcement. It has already shrouded the nation in gloom, and bowed in grief the universal heart.

Our elder brother of the Bar, our professional exemplar, guide, and friend, DANIEL WEBSTER, is no more! And where, throughout the broad land, which is filled with the tokens of his labors and his life, where can the homelike feeling of personal grief, for a personal loss, find a more natural and fitting expression, than among his professional brethren of the Old Colony? Here was the latest home of his affections. It will be the last home of all of him that belongs to earth.

At our first annual assembling in the presence of this court, where his living voice has so often uttered the highest wisdom, and where his spirit will long linger, I am desired to submit to the court certain Resolutions, which the Bar have adopted, as an expression of their sense of the magnitude of the loss which they, in common with the whole country, have sustained. They have had no time, or opportunity, nor have they desired it, to clothe in any elaborate forms of rhetoric, the sentiments with which this solemn event has filled their hearts. They offer these brief Resolutions as a simple and spontaneous expression of the feeling which this great national bereavement has inspired. And I shall most satisfactorily discharge the duty with which I am charged by my brethren, and best answer their expectations and wishes, by accompanying them with a few simple prefatory words.

Under this autumn sun, a rich harvest has been gathered into the garner of mortality. In both hemispheres, the two foremost men of the two leading nations of the civilized world, to each of whom was committed by their Creator the perilous gift of the ten talents, have been summoned by Him to give an account of their stewardship; the soldier-statesman — the lawyer-statesman, — each in his sphere mightiest among the mighty; both, too, following close upon the footsteps of another great luminary of our profession, whose mortal light has just faded behind yonder western hills, and for whose departure the tears are yet moist upon a nation's cheek.

Were it not, Mr. Chief Justice, for our Christian faith in that overruling Providence, whose dread summons it is that has just been so often sounded in our ears, and who we know "ordereth all things well," as he "doeth his pleasure among the inhabitants of the earth," we might be tempted, in this hour of our bereavement, to utter the desponding lamentation which the great poet has so touchingly expressed in verse.

> "We have fallen upon evil days,
> Star after star decays,
> The brightest names, that shed
> Light o'er the land, have fled."

In contemplating the character and career of Mr. Webster as a lawyer, we can scarcely measure the magnitude of the debt which, as lawyers, we owe to him. Let those who aspire to reach the pure heights of this noble

profession — and who that is stirred by a spark of worthy ambition, does not so aspire? — remember the encouragement his life has furnished to every youth whose days are devoted to its toilsome pursuit. What a reflected light have his great achievements thrown back upon the humble home of his childhood among the New Hampshire hills; from which, by patient and unremitting labor, devoted with unsurpassed fidelity to his profession, he advanced to a position in the world's regard which will make that humble home a shrine of pilgrimage through all coming time. Wherever, throughout the world, justice is administered among men, he has made the name of an American lawyer an honored name. His worthy conceptions of the true character of the profession, the exalted aims which he early set before himself, in its pursuit, and the admirable and resolute training of all his great faculties to meet its requirements, enabled him to shed upon it a new glory, by showing to the world its fitness for training the intellectual powers for the highest achievements of statesmanship. To the most brilliant effort of his public career, he carried the training and discipline of the lawyer's mind, and through it he achieved a triumph for himself and for his country, the effects of which will last as long as the Union which it established, and the memory of which will be coeval with the knowledge of his native tongue.

When he was summoned to that "Great Debate," he found that in certain portions of the country there was a prevalent, confused idea, that the government of the United States was a mere confederation, or congeries of independent States, a phantom, an unreal mockery of power. With a masterly exertion of that great faculty which he possessed in so eminent a degree beyond all other men, of making the most complicated and difficult problems simple and intelligible to the humblest mind, he established that Government on the irreversible convictions of the people of this country, as a real, living, substantial thing — the efficient Government of a great Empire, founded upon the sovereignty of the whole people.

No other man of our time could have accomplished this great work, so vital to every interest of this Union. Mighty in intellect, of a most majestic presence, of infinite gifts and resources, the impress of greatness was stamped upon him by the hand of the Almighty. He seemed to be the very type and embodiment of Shakspeare's apostrophe to man: "How noble in reason — how infinite in faculties — in form and moving, how express and admirable — in apprehension how like a God!"

But he has gone from amongst us, and we would turn in cheerful Christian faith from the gloomy aspect of this great bereavement, to the felicities which attended the close of his earthly career.

He had rounded the full measure of threescore years and ten. The great record of his long life's services to his country had been made up. His work was finished. He enjoyed the full fruition of that Eastern benediction which is so dear to the heart of man, that it has been wrought into the expression of a universal wish, "May you die among your kindred." More than all, it was vouchsafed to him to realize the hope, which he once expressed in language of surpassing sublimity and fervor, that "When his eye should be turned for the last time to behold the sun in heaven, he might not see him shining on the broken and dishonored fragments of a once glorious Union." Thanks be to God, "its last feeble and lingering glance beheld the gorgeous ensign of the Republic, known and honored throughout the earth, still full high advanced — not a stripe erased or polluted, or a star obscured."

And thus this great man departed. Surrounded "by all that should accompany old age, as honor, love, obedience, troops of friends."

His last words still echo in our ears, as they will echo in the ears of other

generations of men, long after we shall have passed away like the dust of the summer threshing-floor. "I still live." How true for him, in this world, throughout all time. "*Vita brevis est; Cursus gloriæ Sempiternus.*" May we not humbly trust that it was equally true for him in that higher and better sense which assures us of his participation in the gracious promise — "He that liveth and believeth in me, shall never die."

Mr. Clifford then read the resolutions adopted by the Bar, and moved the court that they be entered upon its records, and that the court do now adjourn.[1]

SLAVES IN TEXAS.— We find in the Western Texan the following report of a case decided at San Antonio, which affects materially the slave population of Texas.

"Martha Arnold, administratrix of the estate of Hendrick Arnold, deceased, brought suit to recover the negro girl Harriet, in the possession of George Martin, administrator of the estate of James Newcomb, deceased.

"Martin answered, that his intestate had bought the girl of Hendrick Arnold during his lifetime, under the obligation of freeing her at the end of five years, and that he was taking steps to discharge said obligation, by sending the girl to a free state, and that the girl was by the laws of Texas free, having been born in the province of Texas, then part of the government of Mexico, in the year 1827, and after the formation of the constitution of Coahuila and Texas, after which no slaves were born in said states.

"The proof showed that Harriet was the issue of Dolly, who was brought from the United States as a slave, about the year 1826, to Austin's Colony, in Texas, and that Harriet was born on the Brazos in July or August, 1827. It was also shown that the constitution of Coahuila and Texas was published in Bexar in the early part of April, 1827, and on the Brazos in the same month. Oliver Jones, one of the early settlers of Austin's Colony, was examined on the stand, and stated that slavery was not recognised in this country by the laws of Mexico, even prior to the publication of the constitution of Coahuila and Texas. His testimony was fully corroborated by the old inhabitants of this place.

"Dolly was one of those declared slaves by the 9th section of the General Provisions of the Constitution of the Republic of Texas, in 1835. Harrriet having been born in the country, was not embraced in this provision of the constitution.

"The judge charged the jury, that according to the laws of Mexico, slavery did not exist in this country prior to the constitution in 1836; that even if the laws of Mexico were abrogated by the revolution, the declaring those slaves who emigrated to the country prior to the adoption of the constitution, would not make slaves of the issue born previous to that time.

"It was admitted in argument, that if the laws of Mexico, not positively repealed by the laws of the new government, *proprio vigore*, continued in force, no slave was born in Texas prior to the repeal of those laws in 1840. But it was contended that all laws of Mexico were abrogated by the change of government, and that the condition of the offspring, whether born before or after the revolution, was the same as the mothers, and that the mothers who emigrated to the country having been declared slaves by a high act of sovereign power, made slaves of the offspring,

[1] NOTICE. — We have devoted a large portion of this Number to the proceedings of the Bar in honor of their great leader. And in our next number, if the space permits, — and if not, in the following numbers, — we shall continue the record. The reply of Chief Justice Shaw to the remarks of the Attorney-General, is in type, but was excluded for want of space.

especially those under age, unless there remained in force some particular law that took the offspring out of the general rule.

"It was also admitted that the decision of the Supreme Court seemed to recognise the principle, that the laws of the former government remained in full force until positively repealed by those of the new government, unless inconsistent with the constitution, the nature of our institutions, and the laws newly adopted."

The jury, after a retirement of five minutes, rendered a verdict declaring Harriet born free, and now a free woman. It is believed this decision, if sustained by the Supreme Court, will have the effect to set at liberty some thousands of persons who have heretofore been considered slaves But in the expressive language of Judge Devine, if such be the law, the duty of courts and juries is plain. An appeal will be prepared for the Supreme Court.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Abbott, David	Andover,	Oct. 18,	John G. King.
Addison, R. Ball	Bolton,	" 29,	Charles Mason.
Allen, Enos G.	Manchester,	" 28,	John G. King.
Allen, William B.	Roxbury,	" 6,	William S. Morton.
Atherton, Otis	Newton,	" 4,	Bradford Russell,
Baker, Eliphalet	Roxbury,	" 19,	William S. Morton.
Baird, Oliver S.	Tyringham,	" 25,	J. E. Field.
Baxter, Lewis, Jr. et al.	Roxbury,	" 7,	William S. Morton.
Berry, William et al.	Lynn,	" 2,	John M. Williams.
Bigelow, Charles et al.	Sherburne,	" 25,	Asa F. Lawrence.
Brigham, Nicholas H.	Boston,	" 5,	Frederic H. Allen.
Brooks, Franklin	Cambridge,	" 8,	Asa F. Lawrence.
Coleman, Lafayette	Gardner,	" 15,	Charles Brimblecom.
Collins, Elisha Knowles	Boston,	" 14,	Frederic H. Allen.
Constant, Victor	Boston,	" 15,	John M. Williams.
Cooley, Luman	Tyringham,	" 21,	J. E. Field.
Currier, John B.	Boston,	" 6,	Frederic H. Allen.
Cutter, James D.	Hatfield,	" 18,	Haynes H. Chilson.
Ellis, Obed	Ashby,	" 26,	Bradford Russell.
Fisk, Robert P.	Boston,	" 4,	Frederic H. Allen.
Frye, Stephen	Andover,	" 4,	Daniel Saunders, Jr.
Garvin, Ezra K.	Boston,	" 16,	Frederic H. Allen.
Goss, Sumner	Millbury,	" 19,	Henry Chapin.
Goulding, Henry	Boston,	" 14,	Frederic H. Allen.
Head, Amos et al.	Cambridge,	" 2,	John M. Williams.
Joy, Silas S.	Dudley,	" 26,	Henry Chapin.
Klous, Seman	Boston,	" 15,	Frederic H. Allen.
Luscomb, George A.	Marblehead,	" 9,	John G. King.
Merritt, Ambrose	Milton,	" 22,	William S. Morton.
Moore, Dana R.	West Roxbury,	" 5,	William S. Morton.
Munroe, William	Boston,	" 4,	Frederic H. Allen.
Nutting, Freeman	South Hadley,	" 19,	Haynes H. Chilson.
Page, Charles et al.	Danvers,	" 13,	John G. King.
Partridge, Harvey Pratt	Boston,	" 19,	John M. Williams.
Pond, Joseph E.	Dedham,	" 23,	Jona. P. Bishop.
Richardson, John B.	Millbury,	" 2,	Henry Chapin.
Richardson, Royal	Cambridge,	" 16,	Asa F. Lawrence.
Shelton, Gardner	Leominster,	" 29,	Henry Chapin.
Stone, James, Jr.	Salem,	" 25,	John G. King.
Tinkham, Henry	Taunton,	" 13,	E. P. Hathaway.
Wait, Thomas C.	Roxbury,	" 19,	William S. Morton.
Wallis, Aaron	Ipswich,	" 16,	John G. King.
Warren, Silas	Boston,	" 20,	Frederic H. Allen.
Whicher, Wm. E. et al.	Roxbury,	" 7,	William S. Morton.
Whitaker, David C.	Stockbridge,	" 11,	J. E. Field.
White, Moses	Hadley,	" 18,	Haynes H. Chilson.
White, Samuel C.	Lawrence,	" 21,	Daniel Saunders, Jr.
Wight, James H. et al.	Newton,	" 25,	Asa F. Lawrence.
Wilson, Reuben S.	Dedham,	" 18,	Jona. P. Bishop.